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IN THE

Supreme Court of the United States

OCTOBER TERM 1978

NO. 78-897

TEXAS EDUCATION AGENCY
(Austin Independent School District), et al,
Petitioner

v.

UNITED STATES OF AMERICA, et al,
Respondents

MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, et al,
Intervenors-Respondents

DEDRA ESTELL OVERTON, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, et al,
Intervenors-Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Austin Independent School District petitions for a writ of certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 564 F.2d 162 (1977) and is reproduced in the Appendix at 14. Petitioner filed a Petition for Rehearing *En Banc*. The Court of Appeals requested opposing parties to respond to the Petition for Rehearing and briefs were filed. On September 7, 1978, the Petition for Rehearing was denied with a written opinion, which is reproduced in the Appendix at 1. The Opinion and Order of the United States District Court for the Western District of Texas, Austin Division, entered August 1, 1973, is unreported and is reproduced in the Appendix at 94.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). This petition for certiorari is presented within 90 days of the date of the denial of the Petition for rehearing by the Court of Appeals.

QUESTIONS PRESENTED

1. Did the Court of Appeals comply with this Court's mandate when it again found unconstitutional segregation of Mexican-Americans solely by the application of a foreseeable consequences standard to disproportionate impact, thereby holding that a *prima facie* case of discrimination had been established and could not be rebutted by the School District?

2. Did the Court of Appeals apply an improper legal standard when it held that notwithstanding its determination of benign or benevolent motive, disproportionate effect will require a holding of invidious discriminatory intent or purpose?

3. Whether the Court of Appeals erred in rejecting a desegregation plan in which all schools with grades six through twelve were desegregated but because of the District Court finding, in compliance with *Swann*, that further desegregation of certain predominantly black elementary schools could only be carried out by the use of additional transportation imposing on elementary age children a risk to health and probable impingement on the educational process deemed to be prohibitive, additional desegregation was deemed to be impossible?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions are involved in this case and are set forth in the Appendix: (a) Fourteenth Amendment to the United States Constitution; (b) 20 U.S.C. § 1701, § 1702(a)(4) and (5), § 1704, § 1705 and §1707; and (c) 42 U.S.C. § 2000c-6(a) and (b).

STATEMENT OF THE CASE

This case is before this Court for a second time. On December 6, 1976, this Court granted the School District's petition for certiorari to review the May 1976 opinion of the Court of Appeals and vacated the judgment and remanded for reconsideration in light of *Washington v. Davis*, 426 U.S. 229 (1976). *Austin Independent School District v. United States*, No. 76-200, 429 U.S. 990 (1976). Mr. Justice Powell, joined by the Chief Justice and Mr. Justice Rehnquist, wrote a concurring opinion. This petition seeks review of the opinion written by the Court of Appeals in response to this Court's remand for reconsideration.

A. The School District

The City of Austin is the capital of Texas and has long been a tri-ethnic community. Blacks and Mexican-Americans serve on the governing boards of its school district, county and city governments. Unlike many other cities, the Austin Independent School District (School District) began compliance with *Brown v. Board of Education*, 349 U.S. 294 (1955), almost immediately. In August 1955, the School District voluntarily adopted a desegregation plan commencing with the high school level and in 1963 this plan was extended to encompass all grades. In the 1960's the Department of Health, Education and Welfare repeatedly certified that the School District was in compliance with the Civil Rights Act of 1964.

The School District includes the City of Austin and certain adjoining areas. During the 1977 school year it operated 81 schools with approximately 59,000 students, approximately 15 percent of whom are black, 23 percent Mexican-American and 62 percent Anglo (non-Mexican-American whites). The City is bisected north and south by a major expressway (Interstate 35) and east and west by the Colorado River. Few bridges cross the river and these are, for the most part, located near the center of the City. Along the west side of Interstate 35 and in the center of the City are the downtown area, the State's Capitol Complex and the University of Texas. Few major east-west streets cross this area. As in other urban areas with significant ethnic populations, Austin has areas of residential ethnic and racial concentrations. The heaviest concentration of blacks and Mexican-Americans is located in the East Austin area which is geographically isolated by the Colorado River on the south, the downtown area,

the Capitol Complex, University of Texas and Interstate 35 on the west and the School District boundary on the north and east. Many Mexican-Americans have resided south of that area in the east and southeast portion of the School District, and Anglos have resided mostly in the west, south and north sections of Austin. The areas of black and Mexican-American concentrations have expanded and shifted over the past years and continued to expand and shift.

Austin is an urban area and a neighborhood school assignment policy has always been used, except as to blacks during the time when State statutes mandated the assignment of blacks to separate facilities. Until the start of a court-ordered desegregation plan, no extensive bus transportation system was used by the School District. The percentage of students transported at this time for any purpose is relatively small. Throughout the School District's history, Mexican-Americans have always been treated as "white." No statute, school board regulation or policy that requires segregation of Mexican-Americans exists or has ever existed and Mexican-Americans and Anglos have in fact attended Austin's schools together virtually at all times.

B. Procedural History

On August 7, 1970, the United States filed suit, pursuant to 42 U.S.C. § 2000c-6(a) and (b), against several school districts, including Austin, alleging segregation of Mexican-Americans and that prior segregation of blacks had not been fully remedied.

On June 28, 1971, after trial, the District Court issued a Memorandum Opinion and Order in which it found no

de jure segregation of Mexican-Americans, but that some all-black schools survived as vestiges of the prior dual system. App. 131. On July 19, 1971, an order was entered providing for the implementation of a plan to remedy these remaining vestiges. App. 108.

The United States appealed these orders to the Fifth Circuit, and certain individuals represented by the National Association for the Advancement of Colored People (NAACP) and by the Mexican-American Legal Defense & Educational Fund (MALDEF) were allowed to intervene in the appeal. The Fifth Circuit considered the appeal *en banc*, with 14 judges participating. On August 2, 1972, the Court issued seven opinions. 467 F.2d 848-891 (*Austin I*). One-half of the judges did not reach the merits because of the pendency of *Keyes v. School District No. 1, Denver, Colorado*, 413 U.S. 189 (1973), (then undecided), but because the Court was evenly divided, they joined with an eighth judge in voting to remand the case to the District Court without deciding the merits of the Mexican-American issue. See Judge Godbold's opinion, 467 F.2d at 889. The other six judges would have reversed the District Court on both the Mexican-American issue and the remedy issue. See Judge Wisdom's opinion, 467 F.2d at 852. Judge Wisdom would have abolished the distinction between *de jure* and *de facto* segregation and would have held all school racial or ethnic imbalance unconstitutional, regardless of the absence of a showing of discriminatory purpose, where the imbalance was "a natural and foreseeable consequence" of school board actions or inactions.

On remand, the District Court heard 12 days of new evidence and reconsidered the evidence from the prior

trial. On the basis of its reading of *Keyes*, the District Court held that the School District, because of past *de jure* segregation of blacks, had the burden of showing that there had been no *de jure* segregation of Mexican-Americans. On the issue of alleged segregation of Mexican-American students, the District Court noted that 11 out of 79 schools educated disproportionate numbers of Mexican-Americans. App. 96. The District Court reviewed all the evidence and found that in no area of its responsibilities had the School District ever acted with segregative intent or purpose toward Mexican-American students. App. 100. The statistical imbalance was found not to result from any statute, rule, regulation or policy of the School District prohibiting Mexican-American students from attending schools with Anglos, and not to be in any way related to the maintenance of the previously statutorily mandated black-white dual school system. App. 97. Having shifted the burden to the School District, the District Court found that the School District had met its burden of showing an absence of action motivated by a discriminatory intent or purpose. App. 100.

In fashioning a remedy to eliminate any remaining vestiges of the statutory segregation of blacks, the District Court considered the already complete integration of grades seven through twelve and the existence of a substantial number of integrated elementary schools. The Court found that the sixth grade could be integrated through the establishment of sixth grade center schools, but that additional integration of lower grades would involve "progressively massive transportation, uprooting of children in their earliest formative years, and would be educationally dysfunctional." The Court further found

that "the time required for transportation, risk to health, and probable impingement of education of students younger than the sixth grade would be prohibitive under any such plan." App. 103. After considering all aspects of the existing situation, the Court ordered the adoption of a plan that, combined with the previous plans and other steps ordered by the Court, achieved the greatest degree of desegregation possible, taking into account the practicalities of the situation.

The United States and the Intervenors appealed. After approximately two and one-half years, without oral argument, the Court of Appeals, through Judge Wisdom, the author of the minority opinion in 1972, issued an opinion reversing the District Court's holding that there had been no *de jure* segregation of Mexican-Americans. 532 F.2d 380 (1976), *vacated and remanded*, 429 U.S. 990 (1976) (*Austin II*), App. 51. The Court did not determine whether the District Court's findings of fact were clearly erroneous. Instead, it adopted a legal theory—that by the use of the natural and foreseeable consequences test, a neighborhood school assignment plan in areas of Mexican-American residential concentration could be deemed to be in itself unconstitutional—that made the factual findings irrelevant. A legal standard requiring the finding of unconstitutional segregation based upon the reasonably foreseeable effect of the use of neighborhood schools was adopted and under that standard the School District was inevitably held to have discriminated against Mexican-American students. The Court of Appeals also ordered a sweeping system-wide remedy.

The School District petitioned for certiorari and the Plaintiff-Respondent (United States through the Department of Justice) stated that it did not oppose the granting of the petition. The petition was granted, the judgment of the panel was vacated and the case was remanded for reconsideration in light of *Washington v. Davis*.

C. The Current Court of Appeals' Opinion (Austin III)

In *Austin III*, the Fifth Circuit has purported to reconsider its prior opinion after the remand by this Court. 564 F.2d 162 (1977), App. 14. After reconsideration, it has in effect simply reinstated its former decision in *Austin II* on the basis of the same reasoning. The Fifth Circuit has taken the disproportionate impact of official action and held that this alone is sufficient to show *de jure* segregation on the basis that schools with a disproportionate number of Mexican-Americans were a foreseeable consequence of actions by the School District. The Fifth Circuit, apparently writing only on the question of whether a *prima facie* case had been made out by Plaintiff-Respondent, treats as irrelevant both the District Court's findings of no intent or purpose to segregate and the Fifth Circuit's own finding in previous opinions, repeated in *Austin III*, that the principal actions and effects to which the Fifth Circuit applies its foreseeable consequences test were undertaken with a benign motive. The Fifth Circuit announced that it accepted the discriminatory purpose requirement as clearly enunciated by this Court, but it actually accepted it in name only and rejected it in fact and has again looked to effect in the form of the foreseeable consequences standard to provide the basis for holding all school racial or ethnic imbalance unconstitutional.

REASONS FOR GRANTING THE WRIT

This petition submits questions of the standards to be used in determining segregative intent when this Court's decisions in *Washington v. Davis* and *Arlington Heights*[1] are applied to school desegregation cases and the role of the foreseeable consequences standard used by some circuits to infer intent. Further presented are questions regarding application of the remedial standards set by this Court in *Swann*[2] and *Dayton*.[3] The School District submits that its petition for certiorari should be granted because (1) the Court of Appeals' opinion conflicts with the opinions of this Court; (2) there is conflict in the circuits as to the application of *Washington v. Davis* and *Arlington Heights* to school desegregation cases; and (3) the questions presented are of overriding national significance. Additionally, the effect of allowing the opinion in *Austin III* to stand may well be to reopen questions thought to have been settled by *Washington v. Davis* and *Arlington Heights.*

I.

THE LIABILITY FINDINGS AND THE CONFLICTS REGARDING THE PROPER ROLE OF DISPROPORTIONATE IMPACT AND THE FORESEEABLE CONSEQUENCES STANDARD

This Court noted in *Washington v. Davis* that in school desegregation cases discriminatory purpose was the

1. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).

2. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

3. *Dayton Board of Education v. Brinkman*, 433 U.S. 406 (1977).

paramount factor, not impact. The fact that there are predominantly black and predominantly white schools in the community is not alone violative of the Equal Protection Clause. In *Austin II*, the Court of Appeals held unconstitutional the use of a neighborhood school assignment policy in a community with residential concentrations of Mexican-Americans because racially and ethnically imbalanced neighborhood schools was the foreseeable consequence of the use of the neighborhood school policy. The application of such a holding nationwide would have made neighborhood school assignment *per se* unconstitutional because, as Justice Powell noted in his concurring opinion in *Austin*, most larger cities with substantial minority populations, including Austin, have residential areas in which certain racial and ethnic groups dominate in the population. Had the *Austin II* reasoning been applied in *Washington v. Davis*, the continued use of Test 21 with its disproportionate impact, would have required a finding that the police department was motivated by discriminatory intent or purpose. The holding of the Fifth Circuit in *Austin II* was obviously in direct conflict with this Court's holding in *Washington v. Davis* and thus the Court summarily vacated *Austin II*.

This Court's disapproval of the *Austin II* standard was further illustrated by *Arlington Heights*. It was made clear there that determining whether invidious discriminatory purpose was the motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. It was further noted, in footnote 21 in *Arlington Heights*, and in the subsequent case of *Mt. Healthy City School District Board of Education v. Doyal*, 429 U.S. 274 (1977), that even if the decision in question was motivated in part by an invidious

discriminatory purpose, the action would not necessarily be invalidated.

This Court did make clear that disproportionate impact does provide an important starting point since, as is obvious, without disproportionate impact there would be no cause to declare an act invidiously discriminatory.

Analysis of the holding of *Austin III* is difficult since the Fifth Circuit failed to recognize the allocation of the burden of proof made by the District Court. The District Court held that a *prima facie* case of unlawful segregation had been established by the plaintiffs, as did the district court in *Washington v. Davis,* and shifted the burden of proof to the School District to show the absence of segregative intent. Therefore, the issue before the Fifth Circuit became whether the District Court's determination that the School District's actions were not motivated by segregative intent was clearly erroneous. However, the appellate court addresses itself only to the question of whether a *prima facie* case had been established. That this is true is demonstrated by the Court's concern that "in neither *Washington v. Davis* nor *Arlington Heights* did the Supreme Court directly confront the issue of what type of official intent—subjective or objective—a plaintiff must show to present a *prima facie* case of impermissible racial or ethnic discrimination or segregation under the fourteenth amendment's equal protection clause." App. 26. Further evidence of this misconception by the Fifth Circuit is found when the Court again adverts to the evidence which demonstrates that segregation of Mexican-American students was "pervasive and intentional" and finds it "unnecessary, therefore, to determine whether absent this evidence the plaintiff could

nevertheless have made out a *prima facie* case of ethnic discrimination by relying upon one or both of the presumptions announced by the Supreme Court in *Keyes.*" The real question in the case, whether the School District has successfully rebutted the *prima facie* case of the plaintiffs by proving the absence of segregative intent, was not considered by the Fifth Circuit.

After an analysis of *Washington v. Davis, Arlington Heights* and related cases, the Fifth Circuit first concluded, in *Austin III,* that the vacation and remand of *Austin II* by this Court was based upon nothing more than a concern over "an ambiguity" as to whether the opinion in *Austin II* had allowed an inference of discriminatory intent solely from the use of a neighborhood school assignment policy. There should, of course, be no need to use the term "ambiguity" in view of the direct and specific holding on that point in *Austin II.* App. 70. In so doing, the Fifth Circuit misses the entire point of this Court's holdings in *Washington v. Davis* and *Arlington Heights.* This appears plainly from the fact that the Fifth Circuit holds that the District Court "applied an erroneous legal standard in assuming that there could not be discriminatory intent when the actions were prompted by what was thought at the time to have been a benign motive. . . ." App. 41. The Fifth Circuit quotes with approval from the minority opinion in *Austin I* and *Austin II* and notes that "a benign motive will not excuse the discriminatory effects of the school board's actions." App. 34. In the Fifth Circuit's opinion on motion for rehearing, noting that the clearly erroneous rule as required by Rule 52, FED.R.CIV.P., does not apply, the panel notes that "the intentional isolation of Mexican-American children is not excusable on the ground that

such treatment was inspired by a benevolent motive." App. 10. Thus, despite this Court's holdings in *Keyes, Washington v. Davis, Arlington Heights* and subsequent cases, the Fifth Circuit deems irrelevant the District Court's finding that the School District was actually motivated by a humane and compassionate use of then accepted and proper educational techniques and its desire to maintain neighborhood schools. Rather, if a disproportionate impact results, the Fifth Circuit will use the foreseeable consequences standard to override contrary and direct evidence and infer that the School District was motivated by an intent or purpose to segregate. It is clear that in the Fifth Circuit, effect is the paramount factor, not the motive, intent or purpose.

The invalidity of the Fifth Circuit's use of the foreseeable consequences test as the sole factor for determining segregative intent is readily seen when the discussion of the neighborhood school assignment policy is contrasted with this Court's holding in *Washington v. Davis.* The Fifth Circuit interprets *Washington v. Davis* as holding that when "the official actions challenged as discriminatory include acts and decisions that do not have a firm basis in well accepted and historically sound non-discriminatory social policy, discriminatory intent may be inferred from the fact that those acts had foreseeable discriminatory consequences. As a practical matter, in school desegregation cases we can envision few official actions, other than the decision to use the neighborhood school policy for student assignment, that would not be subject to the 'natural and foreseeable consequences' rule." App. 27. Disregarded is this Court's holding in *Washington v. Davis,* in reference to Test 21, in which it said "the test is neutral on its fact and rationally may be said to serve

a purpose the government is constitutionally empowered to pursue." 426 U.S. at 246. Further, this Court noted that "a rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be so far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory and licensing statutes. . . ." 426 U.S. at 248. *Washington v. Davis* does not, as the Fifth Circuit states, require that disproportionate impact, applied through the foreseeable consequences test, makes school board actions invidiously discriminatory unless the action has "a firm basis in well accepted and historically sound non-discriminatory social policy. . . ." Rather, if the action of the School Board is neutral on its face and rationally may be said to serve a purpose the School Board is constitutionally entitled to pursue, disproportionate impact does not render the action unconstitutional. The court must look past disproportionate impact and determine whether an actual intent or purpose to invidiously discriminate motivated the action in question. Notwithstanding this, the Fifth Circuit concludes that a discriminatory effect is the key issue since "a benign motive will not excuse the discriminatory effects of the school board's action." App. 34.

The Fifth Circuit would apply the foreseeable consequences test, focusing on disproportionate impact, to almost all official actions of a school board, other than the decision to use a neighborhood school policy for student assignment. In purportedly excepting the neighborhood school assignment policy from the operation of the foreseeable consequences standard, the Fifth Circuit begrudgingly acknowledges that somehow *Washington v.*

Davis and *Arlington Heights* have approved the neighborhood school assignment system. However, the Fifth Circuit immediately proceeds to make this exception meaningless by making clear that "the presumption [invidious discrimination resulting from application of the foreseeable consequences standard to disproportionate impact] is especially probative in assessing the official intent behind such affirmative school board decisions as those concerning school locations, the construction and renovation of schools, the closing of schools, the drawing of attendance zones and the assignment of faculty and staff." App. 27-28. The decisions to construct or close a school or to draw a certain attendance zone in order to maintain student proximity to the school site are no more than the separate decisional elements of the neighborhood school policy. While accepting the neighborhood school assignment policy in name, the Fifth Circuit, by its inference of segregative intent, condemns its operational decisions and thus, by indirection, the policy. Indeed, the panel would draw an inference of discriminatory intent if the School District did not make these operational decisions to ameliorate segregation, or racially or ethnically balance schools. See *Austin III*, App. 28. The Fifth Circuit views the neighborhood school policy as having been subject to "misuse" if disproportionate impact or racial or ethnic imbalance has occurred.

The *Austin III* holding that foreseeable consequences or disproportionate impact can be used to infer an invidious discriminatory intent or purpose is clearly in conflict with the requirement of *Washington v. Davis* and *Arlington Heights*. This conflict is demonstrated by the Court's reliance on *Monroe v. Pape*, 365 U.S. 167 (1961). The Fifth Circuit in analyzing the intent requirement of § 1983 as interpreted in *Monroe* and *Pierson v. Ray*, 386 U.S. 547, 556-57 (1967), noted the critical distinction between the foreseeable consequences test and any test requiring a determination of actual intent or motivation. Judge Goldberg stated that distinction clearly:

> We think it inconsistent to say in one and the same breath that a man is "responsible for the natural consequences of his actions," . . . and that he is responsible only if his actions are improperly motivated. *Whirl v. Kearn*, 407 F.2d 781, 788 (5th Cir. 1969).

Because purpose or intent to discriminate is an essential element of invidious discrimination, the foreseeable consequences test announced by this Court in *Monroe* is not determinative of an alleged constitutional violation in the form of official action motivated by an intent or purpose to segregate. As the Fifth Circuit has recognized in *Whirl*, application of the foreseeable consequences standard is not proper where improper motivation is required. Therefore, there is a disagreement not only within the Fifth Circuit as to the applicability of the foreseeable consequences standard but there is a division among the circuits as to whether the test is applicable.[4] In the interest of uniformity and sound judicial administration, this

4. The Second Circuit in *Hart v. Community School Board*, 512 F.2d 37 (2nd Cir. 1975) and the Eighth Circuit in *United States v. School District of Omaha*, 565 F.2d 127 (8th Cir. 1977), *cert. denied*, 434 U.S. 1064 (1978), used the foreseeable consequences standard to infer segregative intent. The Ninth Circuit, however, has repudiated the standard. *Soria v. Oxnard School District*, 488 F.2d 579 (9th Cir. 1973), *cert. denied*, 416 U.S. 951 (1974). *See also, Berkelman v. San Francisco Unified School District*, 501 F.2d 1264 (9th Cir. 1974), and *Johnson v. San Francisco Unified School District*, 500 F.2d 349 (9th Cir. 1974).

Court should clarify the use of the foreseeable consequences test based upon disproportionate impact.

Disproportionate impact coupled with the foreseeable consequences test cannot be the sole basis for a holding of intent or purpose to discriminate. Since all racial or ethnic imbalance, particularly with the present-day access to statistics and reliable projections, is to a certain degree foreseeable, any policy which permits such imbalance to continue, would, on a strictly objective measure such as a foreseeable consequence standard, amount to *de jure* segregation. Such a theory sweeps more broadly than necessary and collapses the distinction between *de jure* and *de facto* segregation. *See Arthur v. Nyquist*, 573 F.2d 134, 142, n.15 (2nd Cir. 1978).[5]

A brief review of the facts referred to by the Fifth Circuit shows the absence of any meaningful analysis of the facts as required by the clearly erroneous standard

5. The conclusion that a school board was motivated by invidious discriminatory intent or purpose is predetermined when the foreseeable consequences standard is applied to disproportionate impact. The commentators appear to agree that this is the case. For example, Professor Owen Fiss, whose writings are cited by Judge Wisdom in *Austin I*, *Austin II* and *Austin III*, has stated the effect of using the foreseeable consequences test to determine discriminatory intent or purpose:

> This [foreseeable consequences standard] is a plausible way of giving meaning to the concept of intent or purpose in the institutional setting; but it does so by obliterating the distinction between *de facto* and *de jure* segregation. If intent is to be construed from the effect that is foreseeable, then I would suggest that the limiting condition—segregative intent—does not have much bite: The segregation of the neighborhood school is no surprise.

Address by Professor Owen Fiss, Second Circuit Judicial Conference (Sept. 10-11, 1976), *reprinted at* 74 F.R.D. 279 (1977).

See also, The Supreme Court, 1976 Term, 91 HARV. L. REV. 70, 166-67 n. 33 (1977).

of Rule 52. Rather than a careful weighing of the evidence, the Fifth Circuit's holding can only be interpreted to mean that the *prima facie* case is irrebuttable and disproporationate impact, without more, infers invidious discriminatory purpose. The Fifth Circuit takes an adversary-like approach to the facts and in broad, conclusory statements, unsupported by the record, taken for the most part from the minority opinion in *Austin I* which was decided under an erroneous legal standard, looks only at one side of the facts and concludes that a *prima facie* case of *de jure* segregation has been made out. The Fifth Circuit clearly approached the case with the foregone conclusion that it would reach the same result in *Austin III* as it reached in *Austin I* and *Austin II*.

At the outset, it must be kept in mind that in Austin the number of schools and the number of students attending predominantly Mexican-American schools is relatively small. Plaintiffs and the District Court identified some 11 out of 79 schools which educated "disproportionately large numbers of Mexican-American students." Of these eleven schools, five opened as predominantly Anglo schools and, without any significant change in boundaries or other action by the School District, became predominantly Mexican-American schools because of changing residential patterns and the movement of minority groups into the school attendance zones. These 5 schools now educate some 2,257 Mexican-American students or approximately 16 percent of the total Mexican-American students in the School District. Of the other six predominantly Mexican-American schools which opened with a predominance of Mexican-American students, approximately 3,505 Mexican-Americans attend, constituting approximately 24 percent of the total Mexican-American

students in the School District, or 6 percent of the total students. The remainder of the Mexican-American students, approximately 59 percent, are distributed in other schools throughout the School District. All of these students attend school either in their neighborhood or in a school to which they have requested to be transferred under the School District's majority-to-minority transfer program. Therefore, the number of students on whom the neighborhood school assignment policy has a disproportionate impact is small when compared to the total students and to the total Mexican-American students within the School District.

First, Judge Wisdom finds that various School Board decisions confirmed "the existence of segregative intent that the statistics imply." App. 33. In contrast, *Dayton*, *Washington v. Davis* and Justice Powell's concurrence in *Austin* hold clearly that the fact that many schools are either predominantly white or predominantly black, without more, does not offend the Constitution. There is no "implication" of segregative intent by the mere existence of predominantly minority schools. Therefore, statistics cannot "imply" segregative intent. The statistical information is important because, it is obvious, without disproportionate impact there would be no cause of action.

The Fifth Circuit relies for the most part on "evidence" set out in the minority opinion in *Austin I*. The principal evidence to establish the *prima facie* case is the implication in *Austin III* that the School District maintained Mexican-American schools just as it maintained black schools. The record does not bear this out. In *Austin I*, Judge Wisdom found that the special schools or "Mexican

schools" as he now refers to them, were established with a "benign motive." This finding was confirmed in *Austin II*. App. 34. The District Court found that special schools were provided by the School District for the purpose of providing for the special needs of non-English speaking students and students who were members of migrant farm-working families. For example, a school called the Comal Street School was built to provide for the large number of non-English speaking pupils at Palm, Bickler and Metz Elementaries. Only non-English speaking students from Palm, Bickler and Metz attended these special schools. The school offered only grades one through three and students returned to their regular neighborhood schools when they learned to speak English or completed the third grade. The neighborhood school policy was continued in that Comal was located in the same area as Palm, Bickler and Metz. The District Court found that the purpose of the School District in constructing the Comal School was to make special provisions for non-English speaking students, clearly a legally proper educational purpose and not invidiously discriminatory. The Fifth Circuit simply ignores the fact that in 1924, the year the Comal School opened, a majority of the Mexican-American students living in the Palm, Bickler and Metz attendance zones attended these three majority Anglo schools. By 1935 the percentage of Mexican-American students living in the zones for and attending these three schools had increased to 75 percent. Similarly, during the time Zavala School (which replaced Comal Street School) had an open attendance zone and was used as a special school (1936-1954), substantial numbers of Mexican-American students attended schools with Anglo students in the other schools serving the East

Austin area. No Mexican-American was required to attend these schools and obviously many chose not to do so. The District Court determined that the School District did not establish these schools for a racially or ethnically discriminatory purpose but for the purpose of providing for students with limited or no ability to speak English. The District Court made no inference that discriminatory motive, purpose or intent could be inferred from the establishment of these schools and this finding is clearly supported by the evidence.

The Fifth Circuit says that Bickler School is evidence of a discriminatory intent or purpose. The evidence before the District Court showed that when the school closed as a regular elementary school, a majority of its students were Mexican-American students and these students were all assigned to Palm and Winn, the nearby majority Anglo schools. Judge Wisdom stated in his minority opinion in *Austin I* that "Mexican-Americans were expected to and did attend Zavala; whites attended Metz." This statement comes from the testimony of a former student who was unable to support this statement with anything other than his "assumption." Again, in 1973, the District Court found this not to be the case. Regardless of this finding, two of these special schools were closed long ago (Comal in 1936, West Avenue in 1946) and Zavala was given a separate attendance zone in 1954. Any effect of these schools has long since dissipated. While Judge Wisdom cites the West Avenue School as a school sharing a dual overlapping zone with Pease, an all white school, he fails to even consider the current condition existing in that area. West Avenue was located in West Austin, not East Austin, because the non-English speaking students and children of migrant

workers were living in the area. When these students learned to speak English, they went to Pease. West Avenue was closed in 1946. At this time, Pease has an enrollment substantially the same as the racial and ethnic makeup of the School District. Obviously, no inference can be drawn that the foreseeable consequence of Mexican-American students attending West Avenue was a segregated school since Pease, the school sharing the "dual overlapping zone", is not segregated. There is no disproportionate impact on which to base the foreseeable consequences test. This is ignored by the Fifth Circuit.

Apparently, it is conceded that the motive of the School District in establishing the special schools was benign and therefore no *actual* discriminatory intent or purpose was present. This clearly demonstrates the fallacy inherent in the foreseeable effects standard since use of the standard allows the Fifth Circuit to find on the one hand that the motive in establishing the schools was benign and therefore lacking in discriminatory intent or purpose but on the other hand to infer solely on the basis of disproportionate impact that the School District was motivated by discriminatory intent or purpose.

Without addressing the various types of evidence set out by this Court in *Arlington Heights*, the Fifth Circuit proceeds under a heading called "the post-*Brown* sequence of events indicating intentional racial discrimination." Again, the "evidence" comes from *Austin I*. The Fifth Circuit notes that O'Henry Junior High School opened in the western section of Austin and that the zone lines for Allan Junior High School were moved so that many whites were zoned out of Allan and into O'Henry. The Fifth Circuit fails to consider the fact

that O'Henry was built pursuant to the neighborhood school assignment policy and was built to serve the increasing number of students in West Austin. Before O'Henry opened, Allan had approximately 55 percent Anglo students and approximately 45 Mexican-American students. After O'Henry opened, the assignment of students to the schools nearest their homes resulted in the percentages being reversed with Allan having 45 percent Anglo and 55 percent Mexican-American. It is difficult to conceive how a change in the student ethnic makeup by 10 percentage points shows the School District to be motivated by an intent or purpose to discriminate.

Continuing to rely upon the disproportionate impact standard, the panel quotes *Austin I* for the proposition that the new Johnston High School opened with 78 percent Mexican-American enrollment and thereby somehow inferred discriminatory motive. The panel does not consider the evidence introduced by the School District in its rebuttal case which showed that the School District's decision to build Johnston disproved rather than proved an intent or purpose to segregate. Johnston was built pursuant to an independent consultant's recommendation and was built after the second and third high schools built in Austin were constructed. If Johnston had been built first, it would have removed most Mexican-American students from the only existing high school in Austin, Austin High School. The location of Johnston had no real bearing on whether it opened with a high concentration of Mexican-American students since the need was for a school to serve the large population in the geographically isolated area east of downtown and the boundary lines would have been substantially the same no matter where the school was located if the population was to

be served with a neighborhood school. The School District proceeded normally and in accordance with its neighborhood school construction plan and the historical background of the decision does not reveal any series of official actions taken for invidious purposes.

Similarly, Martin Junior High School was built to serve the neighborhood which had an increasing population of students and the boundaries were drawn upon the closing of University Junior High School to zone students to their nearest neighborhood school, taking into acount the geographical factors in the area. None of this evidence is considered by the Fifth Circuit.

The Court's reliance on disproportionate impact is further shown by its reference to statistics showing that a substantial number of Mexican-American teachers were assigned to schools populated predominantly by Mexican-American students. It notes that no school had a majority of Mexican-American faculty members. The presence of Mexican-American teachers in Mexican-American neighborhood schools is explainable for the most part on the basis of the schools' special programs, such as bilingual education, necessary to provide an equal educational opportunity to Mexican-American students. The teachers assigned to bilingual programs must, of course, be bilingual and there are more Spanish surnamed teachers who are bilingual than there are other teachers.

Referring to *Austin I*, the panel finds evidence of intent or purpose to discriminate by the use of portable classroom buildings in East Austin at the same time as new elementary schools were being built to relieve overcrowded conditions in areas outside of East Austin. Here

the panel's reasoning is most curious for on the one hand, the panel would find that the construction of a new school in the East Austin area, and its opening as a predominantly Mexican-American school, as it must if the neighborhood school policy were to be followed, provides evidence of discriminatory intent or purpose. On the other hand, not constructing a new school but using portable buildings to relieve overcrowding is also employed by the Court as further evidence of discriminatory intent or purpose. As is evident with the foreseeable consequences test, any action or failure to act by the School District which had a disproportionate impact will provide the necessary evidence to support a finding of intent or purpose. The panel overlooks the fact that the East Austin area is and was a densely populated area with very little vacant land and therefore when growth occurred, there was no land on which to build schools but instead portable buildings were used. Conversely, in suburban areas populated by predominantly Anglo students, growth occurred in the form of new housing developments spreading into previously vacant land. New schools were constructed in this area to meet growth in order to provide schools in the neighborhood of all students. This historical background of a racially neutral basis for the actions taken by the School District is ignored by the Court.

Finally, there is the assertion that desegregation plans for black students allowed black students to transfer to Mexican-American schools but not to Anglo schools. The evidence shows otherwise. The record does not indicate that Mexican-Americans were invariably assigned to black schools but not to Anglo schools and there is no argument that this policy was benign. Rather, the record

indicates that students were assigned to their neighborhood schools except for desegregation plans which provided for the desegregation of black students. These students were assigned to schools throughout the District, both predominantly Anglo and predominantly Mexican-American schools.

In summary, the School District's evidence before the District Court, rebutting the *prima facie* case, overwhelmingly establishes that the School District actions were not motivated by an impermissible intent or purpose to segregate. The panel ignores the School District's evidence and instead decides the case based upon findings in the minority opinion in *Austin I*. Apparently, no consideration whatsoever is given to the findings of fact made by the District Court in its 1973 opinion. The School District submits that a review of the record in the proper manner, under the clearly erroneous test, with due regard for the functions of the district and appellate courts as clarified in *Dayton*, leaves no doubt that the District Court's finding of no unconstitutional segregation of Mexican-American students is substantially and amply supported by the evidence and is not clearly erroneous.[6]

II.

THE CONFLICTS REGARDING DETERMINATION OF A PROPER REMEDY

The panel in *Austin III* consistently misstates the remedy imposed by the District Court. It first states

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6. For an extended discussion of the evidence, the School District is filing a copy of its brief to the Court of Appeals with the Clerk of this Court, a procedure followed by the Government in the prior petition for certiorari.

that the remedy was to desegregate "one grade in the black elementary schools—the sixth—leaving segregation untouched in the District's other grades and schools." It then goes on to discuss "the unique limitation on desegregation to the sixth grade" as being sufficient to raise "a fair inference of [intent] to continue extensive segregation. . . ." App. 17. It further improperly characterizes the School District's position as being one that suggests that the 1974 Educational Amendments, 20 U.S.C. § 1701, *et seq.* (1975) "somehow support this blanket exclusion." Finally it states "the partial desegregation of a single grade has no basis in logic or in equity as a remedy suited and efficient to rectify the constitutional deprivations inflicted by segregating school children." App. 43-44.

As this Court will clearly recognize, the panel simply misstates the facts to make these holdings. As the District Court held, the secondary schools, grades seven through 12, have been desegregated. The District Court found that only blacks were entitled to a remedy. As of the 1977-1978 school year, no high school within the School District has in excess of 33 percent black students and no junior high school has in excess of 43 percent black students, with most schools having a range of 10 percent to 15 percent. In view of its finding of no discrimination against Mexican-American students, the District Court's finding that the secondary schools were entirely desegregated was entirely correct. The District Court imposed an additional remedy by including the sixth grade of all schools within the desegregation plan. Under this plan, special sixth grade centers, housing only sixth graders, were set up throughout the School District. The sixth grade centers were carefully structured so that a

reasonable balance between black and Anglo students was created at the time of establishment of the schools. The setting up of this sixth grade center plan required the busing of approximately 1,900 additional students, about 60 percent of whom were Anglo.

In addition, certain other requirements were included in the desegregation plan, such as the establishment of a majority-to-minority transfer policy for both black and Mexican-American students, with the provision of free transportation, the hiring of elementary assistant directors to supervise and evaluate special programs, implementation of specific programs to aid minority students including bilingual/bicultural educational programs, and alteration of existing school attendance zones and the drawing of attendance zones for new schools to promote desegregation. See App. 104.

After having ordered this extensive plan, the District Court was faced with 8 elementary schools in the School District which had a majority of black students. These 8 schools were located in the east Austin area, which as the District Court noted, is a "relatively inaccessible part of Austin." East Austin is accessible to the northeast Austin area but use of these schools to improve racial balance in east Austin would, the District Court found, "upset the natural patterns of integration . . . and very likely result ultimately in total resegregation." Use of predominantly Mexican-American schools in Southeast Austin would, in the District Court's words, "be intolerable" because "schools with substantial Mexican-American populations cannot be made to carry a disproportionate share of the burden of desegregation." Use of the other elementary schools in Austin would require crossing Inter-

state 35, the downtown Austin area, the State Capitol and the University of Texas complexes. This the Court found "would involve progressively massive transportation, the uprooting of children in their earliest formative years, and would be educationally dysfunctional." App. 103. Therefore, relying on this Court's opinion in *Swann*, and considering the age of the children and the risk to health and probable impingement on the educational process, the District Court concluded that "the time required for transportation, risk to health and probable impingement of education for students younger than the sixth grade would be prohibitive under any such plan."

Thus, in devising a remedy to fit the nature and extent of the constitutional violation, a constitutional violation the Court found had ended, as to blacks, by 1963, the District Court explicitly followed this Court's directions in *Swann*, since reaffirmed in *Milliken v. Bradley*, 418 U.S. 717 (1974), and *Dayton*, and ordered a remedy which, taking into account the practicalities of the situation, achieved the maximum feasible desegregation. *Austin III* does not hold the findings of the District Court with regard to tailoring the scope of the remedy to be clearly erroneous. In effect these findings are disregarded. The fact that the District Court followed *Swann* precisely and made the necessary fact findings as this Court has directed is ignored.

In his concurring opinion on the remand of *Austin II*, Justice Powell recognized that the Court of Appeals may have erred by a readiness to impute to the school officials segregative intent far more pervasive than the evidence justified. He also noted that the Court of Appeals seemed

to have erred in ordering a desegregation plan far exceeding any identifiable violations of constitutional rights. As with other cities in the United States, there exists in Austin residential areas in which certain racial and ethnic groups predominate in the population, and the residential concentration problems are accentuated by the geography of the City and therefore nothing short of extensive cross-town transportation would suffice. He further noted that the remedy ordered appears to exceed that necessary to eliminate the effect of any official acts or omissions. Reliance upon the statistics in *Swann* and upon *Green v. County School Board*, 391 U.S. 430 (1968), was improper because the situation in Austin is simply not comparable. Any decree involving a remedy for prior segregation is unique in that the burden falls not upon the school district and its officials but rather upon innocent children and parents.

That the District Court correctly interpreted the law relating to the fashioning of an appropriate desegregation remedy is clearly seen by consideration of both this Court's decisions since the 1973 District Court Opinion and the Educational Amendments of 1974. This Court has continued to recognize the limitations on possible remedies.

As Justice Powell noted there is no evidence in the record available to this Court to suggest that absent constitutional violations the Austin school system would have been integrated to the extent contemplated by the plan set out in *Austin II*. Balancing individual and collective interests, including the specific concerns that relate to the family and to the concern of parents for the welfare and education of their children, especially those

of tender age, the District Court made the proper decision. The Court of Appeals has concluded, agreeing with the District Court, that nothing short of extensive cross-town busing would suffice. The time and distance involved with this extensive cross-town busing is the exact concern to which Congress addressed itself in the year following the District Court's opinion imposing a remedy. Congress declared, in 20 U.S.C. § 1701(a)(2) that the neighborhood is the appropriate basis for determining public school assignments. In § 1702(a)(4) and (5), Congress specifically found that "the risk and harms created by excessive transportation are particularly great for children enrolled in the first six grades" and that "transportation of students which creates serious risks to their health and safety impinges significantly upon their educational opportunity."

Therefore, acting in accordance with this Court's holding in *Swann* and with a later Congressional finding regarding the transportation of elementary age children, the District Court ordered the implementation of a proper remedy. The Court of Appeals, without finding either that the District Court clearly erred as required by Rule 52(b) or that it applied an impermissible legal standard, apparently decided that it was dissatisfied with the limited character of the remedy which the District Court had afforded and proceeded to reverse and order, at least by implication, a far more sweeping remedy. As in *Dayton*, the Court of Appeals did not actually specify a remedy but did in increasingly strong language imply that the remedy must be system-wide. Given the findings of the District Court concerning the unique problems presented by any further desegregation of elementary age children in Austin and the holding by

the Court of Appeals that nothing short of extensive cross-town busing would suffice to attain further desegregation, the District Court's opinion as to remedy correctly followed this Court's opinions and the Court of Appeals has erred in reversing.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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December 5, 1978

Supreme Court, U. S.
FILED
DEC 5 1978
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1978

78-897

NO. _____

TEXAS EDUCATION AGENCY
(Austin Independent School District), et al,
Petitioner

V.

UNITED STATES OF AMERICA, et al,
Respondents
MEXICAN-AMERICAN LEGAL DEFENSE & EDUCATION FUND, et al,
Intervenors-Respondents
DEDRA ESTELL OVERTON, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, et al,
Intervenors-Respondents

APPENDIX TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Austin, Texas 78701

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UNITED STATES of America,
Plaintiff-Appellant,

Dedra Estell Overton et al.,
Intervenors-Appellants,

v.

TEXAS EDUCATION AGENCY et al.
(Austin Independent School
District), Defendants-Appellees.

No. 73-3301.

United States Court of Appeals,
Fifth Circuit.

September 7, 1978

WISDOM, Circuit Judge:

Seven years ago, seventeen years after *Brown,*[1] the Attorney General of the United States initiated this tri-ethnic school desegregation suit under the Civil Rights Act of 1964, 42 U.S.C. § 2000c-6. Nothing was being done in Austin to desegregate the schools. The district court held that the Austin Independent School District

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[1] *Brown v. Board of Education,* 1954, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873; *Brown v. Board of Education,* 1955, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083.

(AISD) had not discriminated against blacks or Mexican-Americans. This Court heard the appeal from that decision en banc, along with *Cisneros v. Corpus Christi Independent School District,* 5 Cir., 1972, 467 F.2d 142, *cert. denied,* 1973, 413 U.S. 920, 93 S.Ct. 3053, 37 L.Ed.2d 1041. In each case the Court (fourteen active judges) unanimously agreed that the school board had intentionally discriminated against both blacks and Mexican-Americans. *United States v. Texas Education Agency,* 5 Cir. 1972, 467 F.2d 848, 864-69 (*Austin I*). In the *Austin* case the members of the Court disagreed (8-6) only as to the remedy. *See* 467 F.2d at 883 and 886.

On remand, the district court concluded, after all, that the AISD had discriminated against blacks. But, in agreeing with the Board, it resorted to a remedy not used since the earliest days of school desegregation: the court desegregated one grade. That was the sixth grade. The order to desegregate applied only to black schools, leaving segregation untouched in the district's other grades.[2] The district court left Mexican-American school children in their segregated facilities. The AISD did not appeal. The plaintiffs and intervenors appealed. We again reversed the district court. We held that the plan for desegregating blacks was constitutionally inadequate. The panel unanimously held that the AISD had subjected Mexican-Americans to intentional discrimination.

[2]The district court agreed with the AISD's rationalization for desegregating only the sixth grade in black schools: desegregation of the elementary schools would require "massive crosstown busing"; the junior and senior high schools were already desegregated; the AISD has no duty to desegregate Mexican-Americans.

United States v. Texas Education Agency, 5 Cir. 1976, 532 F.2d 380, 386-92 (*Austin II*).

On petition of the AISD, the United States Supreme Court granted certiorari, vacated our decision in *Austin II,* and remanded the case to this Court for reconsideration in light of *Washington v. Davis,* 1976, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597.

This Court faithfully reconsidered the case in light of *Washington v. Davis.* We "concluded for the third time, that the AISD intentionally discriminated against Mexican-Americans; that the district court applied an erroneous legal standard in assuming that there could not be discriminatory intent when the actions were prompted by what was thought at the time to have been a benign motive; that the district court's finding as to intent was erroneous." 564 F.2d 162, 174 (*Austin III*). We remanded the case to the district court for a hearing, as required, in our view, by *Dayton Board of Education v. Brinkman,* 1977, 433 U.S. 406, 97 S.Ct. 2766, 53 L.Ed.2d 851.

The AISD filed a petition for a rehearing of *Austin III.* The Court asked for responsive briefs from the United States, through the Department of Justice, from the black intervenors, and from the Mexican-American intervenors. The brief of the United States supports the Court's position that the "panel opinion in this case fully comports with the mandate of the Supreme Court" in *Austin II* and is "entirely consistent" with *Washington v. Davis; Village of Arlington Heights v. Metropolitan Housing Development Corporation,* 1977, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450, and *Dayton Board of Education v. Brinkman.*[3]

Nothing in the AISD's fourth attack on this Court's holding justifies a rehearing. In reviewing the record, the briefs, and the three earlier opinions, a few points stand out and should be referred to, at the risk of being repetitious, if only for emphasis.

I.

This Court sitting en banc in *Austin I* and in panels in *Austin II* (Judges Wisdom, Coleman, and Simpson) and *Austin III* (Judges Wisdom, Coleman, and Tjoflat) unanimously found that the record showed the AISD had intentionally discriminated against Mexican-Americans.[4] We did so without resort to the *Keyes* presumptions. *Keyes v. School District No. 1, Denver, Colorado,* 1973, 413 U.S. 189, 203, 93 S.Ct. 2686, 37 L.Ed.2d 548. The second *Keyes* presumption is that "'even if it is determined that different areas of the school district should be viewed independently of each other', 'a finding of intentionally segregative school board actions in a meaningful portion of a school system . . . creates a presumption that other segregated schooling within the system is not adventitious'." 413 U.S. at 208, 93 S.Ct. at 2697. In a tri-ethnic setting, *Keyes* means that a finding of intentional segregation against one minority group raises the presumption that

[3]Brief of the United States in opposition to the petition of the AISD for rehearing, p. 2.

[4]The AISD at first argued that there were only two classes — white and Negro — within the contemplation of the Fourteenth Amendment, and that placing Mexican-Americans in black schools desegregated such schools. The district court properly recognized Mexican-Americans as a separate ethnic minority.

any segregation suffered by the second minority group was intentional. Here, there is no doubt that AISD discriminated against blacks. This fact alone, therefore, created a presumption — here, we consider, unrebutted — that the segregated schooling of Mexican-Americans was not "adventitious".

The major thrust of the AISD's petition for rehearing is that the holding in *Austin III* that school officials are responsible for the reasonably foreseeable consequences of their acts reinstitutes the type of effect test condemned in *Washington v. Davis* and *Arlington Heights.* Neither of those decisions abrogated the principle that an actor is held to intend the reasonably foreseeable results of his actions.[5] Given the fundamental nature of that principle, it would be out of character for the Supreme Court to have disapproved its use in discrimination cases — without explicitly saying so. In 1961, when *Monroe v. Pape* was decided, the Supreme Court admonished that § 1983 " should be read against

[5]The Supreme Court's remand in this case did not foreclose the utilization of that evidentiary principle in proper circumstances. Where, as here, a school district has engaged in a pattern of decisions in diverse areas, each of which has had the natural and foreseeable consequence of producing "more racial and ethnic separation in the schools than in the residential patterns of the district as a whole," *Austin III,* 564 F.2d at 170, the presumption that the school district intended to discriminate is appropriate. See *National Association for the Advancement of Colored People v. Lansing Board of Education,* 6th Cir. 1977, 559 F.2d 1042, *cert. denied,* 434 U.S. 997, 98 S.Ct. 635, 54 L.Ed.2d 491; *United States v. School District of Omaha,* 8 Cir. 1977 (en banc), 565 F.2d 127, *cert. denied,* 434 U.S. 1065, 98 S.Ct. 1240, 55 L.Ed.2d 765.

the background of tort liability that makes a man responsible for the natural consequences of his actions." *Monroe v. Pape,* 365 U.S. 167, 187, 81 S.Ct. 473, 484, 5 L.Ed.2d 492 (1961). The Supreme Court has not retreated from this view.

Realistically, this judicial mechanism is the most reliable one for the objective determination of intent. That is doubly true when intent to segregate is at issue. As recently observed by the Sixth Circuit,

> Indeed, it would be difficult, and nigh impossible, for a district court to find a school board guilty of practicing de jure segregation, unless the court is free to draw an inference of segregative intent or purpose from a pattern of official action or inaction which has the natural, probable and foreseeable result of increasing or perpetuating school desegregation.

NAACP V. Lansing Board of Education, 6 Cir. 1977, 559 F.2d 1042, 1047-48. In *Lansing* the court expressly relied upon the natural and foreseeable standard. On petition for certiorari one issue was, "Did the Court of Appeals err in affirming the District Court's use of the natural and foreseeable consequences 'test' . . .". 434 U.S. 997, 98 S.Ct. 635, 54 L.Ed.2d 491 (1977).

The AISD does not suggest what type of evidence would suffice to make out a case of intentional discrimination. On historical grounds the AISD seems to say that no discriminatory intent is made out unless segregation is ordered by a statute or ordinance. Perhaps, however, the Board thinks that there must be statements by its members that "We do not want to mix whites and Mexican-Americans". Even if individual school board members

made public statements favoring segregation of Mexican-Americans, this evidence of subjective intent would not necessarily be probative of the school board's intent; any public body may contain one or two extremists who do not express the sentiment of the body. This is one of the points Justice Stevens made in his concurrence in *Washington v. Davis.*[6] The AISD seems to think that because of its stated benign motives, it could not have intentionally discriminated against Mexican-Americans. This notion shows a misunderstanding of school desegregation.

The most effective way to determine whether a body intended to discriminate is to look at what it has done.[7] This does not mean that every time a school board decision has a discriminatory effect one should infer that the board intended the result. Rather, as in *Austin III,* the

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[6]Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds. 426 U.S. at 253, 96 S.Ct. at 2054 (Stevens, J., concurring).

[7]Professor Paul Brest offers two policy reasons why a rebuttable presumption triggered by the natural and foreseeable test is especially applicable in the school desegregation context:

> This shifting of the burden of proof is justified on two grounds. First, the school district enjoys far better access than the plaintiffs to the true reasons underlying the myriad of decisions that determine the extent of school desegregation — decisions concerning such matters as the drawing of attendance zone lines, the location and size of new schools, and the closing of old ones. Second, despite indications of support for some degree of school integration, it is reasonable to assume that school boards throughout the nation tend to

school board's actions must be evaluated in the context of the totality of the board's treatment of minorities. The Board's unreceptivity to integration is clear from the factual findings spelled out in *Austin I and II* and recapitulated in *Austin III*. See especially 564 F.2d at 170-174. In the context of the AISD's performance in the area of race relations, these findings demonstrate an intent to discriminate against Mexican-Americans.

The application of the natural and foreseeable consequences test in *Austin III* was consistent with these principles. We expressly stated that the use of the neighborhood assignment policy, though it foreseeably led to segregated schools, was insufficient, standing alone, to sustain a holding of segregative intent. Instead, we regarded this board policy as one item of evidence suggesting segregative intent. The Court evaluated the use of this policy in light of "an extensive series of actions dating back to the early 20th century" and others that had occurred in more recent years. Only then did the Court hold the segregation to be *de jure*. This is in accord with *Arlington Heights* which draws a distinction between "impact alone" and impact plus "other evidence" bearing

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reflect the desires of many white constituents to avoid having their children attend schools with too high a proportion of minority students.

Brest, the Supreme Court, 1975 Term — Foreword: In Defense of the Anti-Discrimination Principle, 90 Harv.L.Rev. 1, 29-30 (1976). *See also* the thorough discussion of racially discriminatory purpose in Comment, Proof of Racially Discriminatory Purpose Under the Equal Protection Clause: Washington v. Davis, Arlington Heights, Mt. Healthy, and Williamsburgh, 12 Harv.Civ.Rts. — Civ.Lib.L. Rev. 725 (1977).

on the decision-maker's intent. "The impact of the official action . . . may provide an important starting point" for analysis. 429 U.S. at 266, 97 S.Ct. at 564.

The opinion in *Austin III* attempted to suggest a functional basis for determining segregative intent by circumstantial evidence. But irrespective of the methodology used in determining segregative intent, the facts clearly show that the AISD segregated Mexican-Americans, except to the extent that some were integrated in black schools.[8]

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[8]Not all of the evidence of intentional segregation in this case is circumstantial. For example, the Comal Street School was built to "take care of the large number of non-English speaking students at Palm, Metz and Bickler". Pretrial order, Attachment A, p. k-i. Zavala school was built "to provide for the large group of Spanish-speaking citizens of Austin, a suitable, well-equipped building as near the center of this population as possible". Def. Ex. 125, p. 5; Gov. Ex. 6-C, August 8, 1935. In response to a complaint from Anglo parents at the Winn School the Superintendent took the following action: ". . . all Mexican pupils enrolled in John B. Winn School living south of 14th St., had been transferred to Bickler School, except one boy who is being allowed to complete the 7th grade". Gov. Ex. 6-F, September 25, 1935.

The School District had maintained dual overlapping zones. These zones were only found between predominantly Anglo and predominantly Mexican-American schools. 564 F.2d 162, 171-72. The dual overlapping zone is essentially identical to the optional zone frequently found by Courts to be a segregative device. See, e. g., *Morgan v. Kerrigan*, 1 Cir. 1974, 509 F.2d 580, 589, *cert. denied* 421 U.S. 963, 95 S.Ct. 1950, 44 L.Ed.2d 81, 86 *cert. denied* 413 U.S. 920, 93 S.Ct. 3066, 37 L.Ed.2d 1041; *United States v. School District of Omaha*, 8 Cir. 1975, 521 F.2d 530, 540-43, *cert. denied* 423 U.S. 946, 96 S.Ct. 361, 46 L.Ed.2d 280. The AISD does not take issue in their petition for rehearing with this finding.

II.

There is no merit to the AISD's contentions with respect to this Court's application of the clearly erroneous rule. Rule 52, Fed.R.Civ.Pro. In *Austin III* we held that the clearly erroneous rule did not apply, because the district court applied an erroneous legal standard. The intentional isolation of Mexican-American children is not excusable on the ground that such treatment was inspired by benevolent motives. *Stark v. Shell Oil Co.*, 5 Cir. 1971, 450 F.2d 994, 997. But, we held, alternatively, if Rule 52 applies, the court was clearly erroneous.

School construction and abandonment are key indicia of segregative intent. *Swann v. Charlotte-Mecklenberg Board of Education*, 1971, 402 U.S. 1, 21, 91 S.Ct. 1267, 28 L.Ed.2d 554; *Keyes v. School District No. 1, Denver*, 1973, 413 U.S. 189, 201-02, 93 S.Ct. 2686, 37 L.Ed.2d 548. In the *Austin* cases we found that (a) boundary lines were gerrymandered upon the opening of O'Henry Junior High School, (b) Allan Junior High School was rebuilt (after a fire) in its previously segregated locale, (c) Johnston High School was placed to insure its opening as a highly segregated school notwithstanding options which would have enhanced integration, (d) boundaries were gerrymandered between University Junior High School and Martin, and (e) overcrowding and use of portables in East Austin were commonplace while new schools were built to relieve overcrowding in Anglo areas, 564 F.2d 172-73.

In *Austin III* (as in *Austin I and II*) the Court found an extraordinarily high degree of faculty segregation. This alone has been held to establish a prima facie case of intentional segregation. As the Supreme Court observed in *Swann*, 402 U.S. 1, 18, 91 S.Ct. 1267, 1277, 28 L.Ed.2d 554 (emphasis added), "Independent of student assignment where it is possible to identify a 'white school' or a 'Negro school' . . . a *prima facie* case of violation of substantive constitutional rights under the Equal Protection Clause is shown".

III.

The AISD complains that this Court, while purporting to rely on *Dayton*, has attempted "to force a system-wide remedy without regard to the facts that may be found". In *Austin III* this Court repeated the remedial principles expressed in *Keyes*, *Swann*, and *Dayton*. The *Dayton* case was remanded to the district court, not because the plaintiff failed to show that the violations had system-wide effects, but because neither the district court nor the court of appeals had examined the evidence to determine if the defendant had met its burden and because the lower courts failed to address the available evidence as to the scope of the liability. In some cases, after years of fruitless litigation, for the guidance of all the district courts throughout the Circuit, this Court has established general guidelines.[9] As a rule, however, we defer to the district court for it to consider and grant the appropriate relief in the particular case before it to remedy the effects of discriminatory conduct. We followed that principle in *Austin III*. Our opinion properly does not dictate the precise relief in this case. School systems in Austin, Corpus Christi, and other cities with tri-ethnic problems are not fungible with school systems generally. As *Dayton* prescribes:

> the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these

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[9] *See United States v. Jefferson County Bd. of Educ.*, 5 Cir. 1966, 372 F.2d 836; *Singleton v. Jackson Municipal Separate School District*, 5 Cir. 1969, 419 F.2d 1211 (en banc).

> violations had on the racial distribution of the * * school population as presently constituted, when that distribution is compared to what it would have been in the absence of constitutional violations.

Dayton, 433 U.S. at 420, 97 S.Ct. at 2775. See *Austin III,* 564 F.2d at 175. To the extent that we attempted to provide limited guidance to the district court, we were warranted in doing so in the interest of judicial economy. See *Austin III,* 564 F.2d at 164, n. 1.

The AISD bewails its burden of going forward to meet the prima facie case made (or the presumption raised) by the plaintiffs. *Keyes* and *Swann* establish that once a school district has been found to have engaged in intentionally discriminatory conduct, the burden of going forward is on the school district to meet the plaintiffs' prima facie case. *Austin III,* like the *Swann* and *Keyes* cases, applies the settled principle that the perpetrator of a constitutional wrong bears the burden of demonstrating that its violation had no effect, or a limited effect, on what actually happened. See *Arlington Heights,* 429 U.S. at 271, n. 21, 97 S.Ct. 555; *Mt. Healthy City School District Board of Education v. Doyle,* 1977, 429 U.S. 274, 285-287, 97 S.Ct. 568, 50 L.Ed.2d 471. Cf. *Franks v. Bowman Transportation Co.,* 1976, 424 U.S. 747, 771-773, 96 S.Ct. 1251, 47 L.Ed.2d 444; *International Brotherhood of Teamsters v. United States,* 1977, 431 U.S. 324, 358, 362, 359-360 n. 45, 97 S.Ct. 1843, 52 L.Ed.2d 396.

The allocation of the burden is supported by this Court's recent decision in *United States v. Columbus Municipal Separate School District,* 1977, 558 F.2d 228, *cert. denied,* 434 U.S. 1013, 98 S.Ct. 728, 54 L.Ed.2d 757. There the Court held that a desegregation plan was proper

in light of the fact that "we have no reason to suppose that the schools of Columbus would have been less desegregated than they will under the pairing plan." *Id.,* 558 F.2d at 231 n. 11. In so holding, the Court placed the burden upon the school district, for the effect of the Court's order was to approve a desegregation plan, because the school district failed to carry its burden of providing a "reason to suppose that the schools of Columbus would have been less desegregated * * *."

* * * * * *

Over a long period of years, the AISD tried to separate the Anglo strand from the black and Mexican-American strands of its tri-ethnic school system. But the United States Constitution has tied these strands into a knot no Alexander can cut, and may be used to the greater advantage of the school children of the City of Austin.

The AISD must desegregate blacks in other grades than the sixth grade. The AISD must desegregate Mexican-American school children by putting them in schools with Anglos — as well as with blacks.

The petition for rehearing is denied. No member of this Panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local 5th Circuit Rule 12), the petition for rehearing en banc is DENIED.

UNITED STATES of America,
Plaintiff-Appellant,

Dedra Estell Overton et al.,
Intervenors-Appellants,

v.

TEXAS EDUCATION AGENCY et al.
(Austin Independent School
District), Defendants-Appellees.

No. 73-3301.

United States Court of Appeals,
Fifth Circuit.

Nov. 21, 1977.

WISDOM, Circuit Judge:

In accordance with the mandate of the Supreme Court in *Austin Independent School District v. United States*, 1976, 429 U.S. 990, 97 S.Ct. 517, 50 L.Ed.2d 603, we have reconsidered the Austin School case, *United States v. Texas Education Agency*, 5 Cir. 1976, 532 F.2d 380 (*Austin II*), in light of *Washington v. Davis*, 1976, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597. We reaffirm our reversal of the district court's judgment.

After restudy of our two earlier decisions and the record, we again hold that the evidence overwhelmingly supports the conclusion that the Austin School Board,

Austin Independent School District (AISD), engaged in acts showing a pervasive intent to segregate Mexican-Americans. *Dayton Board of Education v. Brinkman*, __ U.S. __, 97 S.Ct. 2766, 53 L.Ed.2d 851 (1977), however, as we read it, compels the remand of the case for a hearing so that the AISD may submit and the district court approve a tri-ethnic desegregation plan consistent with the decisions of this Court and of the United States Supreme Court.

I.

Seven years after the Attorney General of the United States initiated this tri-ethnic school desegregation suit under the Civil Rights Act of 1964, 42 U.S.C. § 2000c-6, it comes to this Court for the third time, this time on remand from the Supreme Court.

In *United States v. Texas Education Agency*, 5 Cir. 1972, 467 F.2d 848 (en banc), *Austin I*, this Court held, with respect to black students, that "the AISD has not dismantled the state-imposed [segregated school] system based on race". The district court had entered an order approving a plan that closed black secondary schools. The students in those schools were assigned to Anglo secondary schools. This plan scattered blacks of secondary school age through the district, but put the entire burden of transportation on blacks. We held, "The AISD has not fulfilled its 'affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch' ". 467 F.2d at 870.

With respect to Mexican-American students, we held that the district court was clearly erroneous in finding

that the AISD had not practiced segregation against that identifiable ethnic minority. We held that through various actions AISD officials "caused and perpetuated the segregation of Mexican-American students within the [Austin] school system". 467 F.2d at 865-866. We ordered that the school system "be converted to a unitary system on a tri-ethnic, desegregated basis". 467 F.2d at 871. The en banc court of fourteen was unanimous in holding that AISD intentionally discriminated against Mexican-Americans and was divided only as to how desegregation should be accomplished.

On remand, the district court was at a disadvantage in carrying out the mandate in *Austin I* in view of the decision of a majority of our Court rejecting a motion to clarify the remedy (the vote was nine to five).[1] 5 Cir., 470 F.2d 1001. The district court also had to consider the Supreme Court's supervening decision in *Keyes v. School District No. 1, Denver, Colorado*, 1973, 413 U.S. 189, 93 S.Ct. 2686, 37 L.Ed.2d 548. The district court reiterated its earlier holding that "the AISD . . . has engaged in discriminatory assignment of black students to promote segregation". The court ordered the black high school and junior high school closed, again throwing the burden of busing only on the blacks. The

[1]The record shows that the district judge said to the attorneys, in regard to the majority's opinion on remedy: "I assume that all of you have read the opinion. I hope that you know more about it than I do . . . [t]hen you, Judge Bell or the majority opinion coming along saying that the only way you can proceed under *Swann* is to ferret out by schools the proscribed segregation. If you can help out any, I sure would appreciate it, about that sort of thing, what they mean by that thing".

district court held that its finding of past intentional segregation of blacks constituted a prima facie case of intentional segregation of Mexican-Americans. It concluded, however, that the AISD had rebutted this prima facie case by demonstrating that there was no intentional discrimination against Mexican-American students. Nevertheless, the court included them in the limited desegregation remedy it approved for blacks. That remedy was to desegregate *one grade in the black elementary schools* — the sixth — leaving segregation untouched in the district's other grades and schools. Mexican-American children were left in their segregated facilities, except for those who attended the Sixth Grade Center. The district court approved certain worthy bilingual and bicultural programs.

The unique limitation on desegregation to the sixth grade in black schools, which the AISD proposed and was approved by the district court, raises a fair inference that the AISD intended to continue extensive segregation of Mexican-Americans. The AISD suggests that the 1974 Education Amendments, 20 U.S.C. § 1701 *et seq.* (1976 Supp.), somehow support this blanket exclusion. There are two answers to this contention. First, as the AISD in its own brief correctly observes:

> "the provisions of this chapter are not intended to modify or diminish the authority of the courts of the United States to enforce fully the fifth and fourteenth amendments to the Constitution of the United States." 20 U.S.C. § 1702(b).

Second, the 1974 amendments do not support the wholesale exclusion of entire grades from a desegregation plan. They merely "find" that "the risks and harms

created by *excessive* transportation are particularly great for children enrolled in the first six grades". 20 U.S.C. § 1702 (a)(5) (emphasis added). This legislation does not purport to prohibit desegregation of children at such grade levels, but points out the obvious; as the Supreme Court said in *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 31, 91 S.Ct. 1267, 28 L.Ed.2d 554, age is one factor in evaluating the "practicalities" of a transportation plan.

In *United States v. Texas Education Agency*, 5 Cir. 1976, 532 F.2d 380 (*Austin II*), the district court's finding of *de jure* discrimination against blacks was not appealed. We again reversed the district court's holding that the AISD had not subjected Mexican-American students to intentional discrimination. We held that the plaintiffs had made out an unrebutted prima facie case of segregation of Mexican-American students. We further held that the Sixth Grade Plan — part time desegregation for some — was "constitutionally insufficient". We instructed the district court to "draft a comprehensive tri-ethnic desegregation plan" that would "conform to one of the approaches outlined by Dr. Finger in his written submission of August 14, 1972, and in his testimony". 532 F.2d at 399. (Dr. Finger was the court-appointed expert in *Swann*.) The Finger Plan, submitted by the Mexican-American intervenors, envisioned the conversion of the Austin school system to a 4-4-4 or a 5-3-4 grade structure in which all students "in elementary schools that are over 50 percent minority would be bused to elementary schools that are over 90 percent Anglo", and middle school students "in schools that are over 90 percent Anglo would be bused to schools that are over 50 percent minority". 532 F.2d at 395. High school integration would be accomplished "by selecting, for each high school, feeder schools that would maximize the integration of that high school". *Id.*

The AISD petitioned for a writ of certiorari. The United States, in its brief on certiorari, had doubts about this Court's rationale in *Austin II*, but contended that the judgment was correct in holding "that the AISD engaged in pervasive acts of discrimination against Mexican-Americans". The Supreme Court granted certiorari, vacated our decision, and remanded the case to us "for reconsideration in light of *Washington v. Davis*." We now review our decision in *Austin II* in light of this mandate.

II.

We note at the outset, our determination that the AISD practiced intentional discrimination against black students is not in issue; the AISD did not appeal the district court's finding to this effect in *Austin II*. 532 F.2d at 392. Moreover, because *Washington v. Davis* is concerned with the evidentiary showing necessary to establish an equal protection violation in those situations where there has been no law specifically requiring segregation, that decision is inapplicable "where a statutory dual system has ever existed", *Keyes v. School District No. 1, Denver, Colorado*, 1973, 413 U.S. 189, 201, 93 S.Ct. 2686, 2694, 37 L.Ed.2d 548, 559.[2] Our concern here, there-

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[2]Such statutory dual educational systems are unconstitutional per se under *Brown v. Board of Education*, 1954, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873. A school board is under an affirmative duty to convert a dual school system to a unitary system. *Swann v. Charlotte-Mecklenburg Board of Education*, 1971, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554; *Alexander v. Holmes County Board of Education*, 1969,

fore, is with the effect of *Washington v. Davis* on our holding that the AISD unconstitutionally discriminated against Mexican-American students.

In *Washington v. Davis* the Supreme Court held that otherwise neutral state action does not violate the fourteenth amendment's equal protection clause "solely" because it has a disproportionate impact on a racial minority. Instead, courts must "adhere to the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose[1]". 426 U.S. at 240, 96 S.Ct. at 2048. The use of the word "solely" was clarified by Mr. Justice White, organ of the Court. He was careful to point out that a racially disproportionate effect may be an important evidentiary consideration in evaluating whether state action was discriminatorially motivated.

> Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another. It is also not infrequently true that the discriminatory impact . . .

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396 U.S. 19, 90 S.Ct. 29, 24 L.Ed.2d 19; *Green v. County School Board, of New Kent County*, 1968, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 16; *Brown v. Board of Education*, 1955, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083.

[1]This principle seems to be the key to an understanding of *Washington v. Davis*. It is a key, however, that does not readily turn in all locked school doors. As Justice Stevens observed in his concurring opinion, "the line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of the Court's opinion might assume". 426 U.S. at 254, 96 S.Ct. at 2054.

> may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds . . . Disproportionate impact is not irrelevant, but it is not the sole touchstone of invidious racial discrimination forbidden by the Constitution.

426 U.S. at 242, 96 S.Ct. at 2049.

More recently, in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 1977, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450, upholding the constitutionality of a local zoning decision that had a disproportionate effect on blacks, the Supreme Court elaborated upon its holding in *Washington v. Davis* by detailing evidentiary guidelines under which the discriminatory intent requirement of *Washington v. Davis* could be satisfied. Mr. Justice Powell, for the Court, carefully noted that *Washington v. Davis* "does not require a plaintiff to prove that the challenged action rested *solely* on racially discriminatory purposes". (Emphasis added). 429 U.S. at 97 S.Ct. at 563. In his opinion he stated:

> The impact of the official action — whether it 'bears more heavily on one race than another,' *Washington v. Davis*, 426 U.S. at 242 [96 S.Ct. 2040] — may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face . . . .
>
> The historical background of the decision is [another] evidentiary source, particularly if it reveals a series of official actions taken for invidious pur-

> poses . . . The specific sequence of events leading up the challenged decision also may shed some light on the decisionmaker's purposes. . . . Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached.

429 U.S. at 266-67, 97 S.Ct. at 564.

In *Austin II*, as will be discussed more fully, we referred to the neighborhood assignment system as neutral on its face, but observed that all of the evidence showed that the AISD resorted to that system only when it would produce the maximum feasible separation of Anglos from Mexican-Americans. When it did not, the AISD resorted to gerrymandering, dual-overlapping zones, discriminatory school siting and capacity decisions (tailoring the design, location, and size of a school to fit only a racial or ethnic group), and other discriminatory devices. The package demonstrated a pervasive intent to discriminate against Mexican-Americans.

The principle that plaintiffs challenging official action as racially or ethnically discriminatory must show the existence of a purpose or intent to discriminate was foreshadowed in *Keyes v. School District No. 1, Denver, Colorado*, 1973, 413 U.S. 189, 93 S.Ct. 2686, 37 L.Ed.2d 548, three years before our decision in *Austin II*. In writing *Austin II* we were conscious of the Court's statement in *Keyes*, "We emphasize that the differentiating factor between *de jure* segregation and so-called *de facto* segregation . . . is purpose or intent to segregate." (Emphasis in original.) 413 U.S. at 208, 93

S.Ct. at 2697. The essential element of *de jure* segregation is "a current condition of segregation resulting from intentional state action". 413 U.S. at 205, 93 S.Ct. at 2696. The court in *Keyes*, however, did not explicate whether the discriminatory intent necessary to make out an equal protection violation in school desegregation cases was to be determined (a) under a subjective standard, which would require a court to determine whether the official decisionmakers harbored a subjective desire to segregate or discriminate[4] or (b) under an objective standard, by which the official decisionmakers would be held to have intended the reasonably foreseeable consequences of their decisions.[5]

We understand the difficulties inherent in employing a subjective intent test to determine whether school board authorities practiced impermissible *de jure* segregation

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[4]As one commentator has observed:

> Some of the language in the *Keyes* majority opinion can be read to endorse the interpretation that 'segregative intent' refers to the subjective motivation of individual school officials. According to the *Keyes* majority, the Denver school authorities' actions were 'deliberate' and 'purposeful'; '*purpose or intent*' was said to distinguish de jure from de facto segregation. Similarly, the Court held that proof of segregative intent with respect to one area of Denver left the school authorities with the burden of showing that their actions in other areas of the city 'were not also *motivated* by segregative intentions'.

Note, Reading the Mind of the School Board: Segregative Intent and the De Facto/De Jure Distinction, 86 Yale L.J. 317, 321-322 (1976) (*emphasis in original*).

[5]The principle that an actor is held to intend the reasonably foreseeable results of his actions is firmly rooted in the common law of torts. *See, e.g.*, W. Prosser, The Law of Torts § 8 (4th ed. 1971); Restatement (Second) of Torts § 8A, Comment b (1965).

against minority students.[6] In *Austin II*, therefore, we adopted an objective test for ascertaining discriminatory

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[6] In *Austin II* we observed:

> [I]t is difficult — and often futile — to obtain direct evidence of the official's intentions. Rather than announce his intention of violating antidiscrimination laws, it is far more likely that the state official "will pursue his discriminatory practices in ways that are devious, by methods subtle and illusive — for we deal with an area in which 'subtleties of conduct . . . play no small part' ".

532 F.2d at 388. *Accord, United States v. Board of School Commissioners of Indianapolis, Ind.*, 7 Cir. 1973, 474 F.2d 81, 88. Justice Stevens, in his concurring opinion in *Washington v. Davis*, provided another reason why an official's personal motivation is an area of inquiry that is generally tangentially probative at best in evaluating whether a school board has practiced *de jure* segregation.

> Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds. This is particularly true in the case of governmental action which is frequently the product of compromise, of collective decisionmaking, and of mixed motivation. It is unrealistic, on the one hand, to require the victim of alleged discrimination to uncover the actual subjective intent of the decisionmaker or, conversely, to invalidate otherwise legitimate action simply because an improper motive affected the deliberation of a participant in the decisional process. A law conscripting clerics should not be invalidated because an atheist voted for it.

426 U.S. at 253, 96 S.Ct. at 2054. *See Dayton Board of Education v. Brinkman*, __ U.S. __, __, 97 S.Ct. 2766, 53 L.Ed.2d 851 (1977) (Stevens, J., concurring). For a further critique of the use of a subjective intent test in school desegregation cases, *see* Note, Reading the Mind of the School Board: Segregative Intent and the De Facto/De Jure Distinction, 86 Yale L.J. 317, 322-327 (1976), remarks of Professor Owen Fiss at the Second Circuit Judicial Conference (1976), reported in 74 F.R.D. 276, 280.

intent and "incorporat[ed] in school segregation law the ordinary rule of tort law that a person intends the natural and foreseeable consequences of his actions". 532 F.2d at 388.[7] In reading the "natural and foreseeable consequences" test into the necessary requirement of segregative intent (*Washington v. Davis*), this Circuit stands not alone, but in company with four other circuits. *Hart v. Community School Board of Education, New York School District #21*, 2 Cir. 1975, 512 F.2d 37, 50-51 (a well articulated decision); *Morgan v. Kerrigan*, 1 Cir. 1974, 509 F.2d 580, 588, *affirming Morgan v. Hennigan*, D.Mass. 1974, 379 F.Supp. 410, 478, cert. denied, 1975, 421 U.S. 963, 95 S.Ct. 1950, 44 L.Ed.2d 449; *Oliver v. Michigan State Board of Education*, 6 Cir. 1974, 508 F.2d 178, 181-182, *cert. denied*, 1974, 421 U.S. 963, 95 S.Ct. 1950, 44 L.Ed.2d 449; *Bradley v. Milliken*, 6th Cir. 1973, 484 F.2d 215, 222, aff'd in relevant part, 1974, 418 U.S. 717, 738 n. 18, 94 S.Ct. 3112, 41 L.Ed.2d 1069, 1087 n. 18

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[7] This result was further compelled, we reasoned, by the fact that in *Monroe v. Pape*, 1961, 365 U.S. 167, 187, 81 S.Ct. 473, 484, 5 L.E.2d 492, 505, the Supreme Court rejected the argument that specific intent is a necessary element of the cause of action under 42 U.S.C. §1983, the statute under which many school desegregation cases are brought. The Court held that §1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions".

We went on to

> find no inconsistency between the rule applied in *Monroe v. Pape* and that applied in *Keyes*, nor . . . any reason for applying a standard different from *Monroe v. Pape* in school desegregation cases.

Austin II, 532 F.2d at 389.

(adopting district court's reliance on "natural and predictable effect" school board policies). *Cf. United States v. Board of School Commissioners of Indianapolis, Ind.*, 7 Cir. 1973, 474 F.2d 81, 84-85, *cert. denied*, 1973, 413 U.S. 920, 93 S.Ct. 3066, 37 L.Ed.2d 1041.

In neither *Washington v. Davis* nor *Arlington Heights* did the Supreme Court directly confront the issue of what type of official intent — subjective or objective — a plaintiff must show to present a prima facie case of impermissible racial or ethnic discrimination or segregation under the fourteenth amendment's equal protection clause. *Washington v. Davis* and *Arlington Heights* did establish that the disproportionate racial impact of the neutral application of a long-standing neutral policy, by itself, will rarely constitute a constitutional violation. Those decisions thus partly answered in the affirmative, one of the questions left open in *Keyes* — "whether a neighborhood school policy of itself will justify racial or ethnic concentrations, in the absence of a finding that school authorities have committed acts constituting *de jure* segregation".[8] We are well aware that some official actions on which a plaintiff hinges an allegation of unconstitutional discrimination have historically been motivated by racially and ethnically neutral *bona fide* concerns, such as the desire to have children attend the school closest to their home, and no showing is made that those concerns were actually subordinate to, or a subterfuge for, unconstitutional discrimination. In those circumstances, that a discriminatory result was the natural

[8] *Keyes v. School District No. 1, Denver, Colorado*, 1973, 413 U.S. 189, 212, 93 S.Ct. 2686, 2699, 37 L.Ed.2d 548.

and foreseeable consequence of the actions is insufficient to infuse the challenged acts with the type of discriminatory intent required by *Washington v. Davis* and *Arlington Heights*. Nevertheless, we emphasize that we do not read *Washington v. Davis* and *Arlington Heights* as banishing from the law of racial and ethnic discrimination the venerable common law tort principle that a person intends the natural and foreseeable consequences of his actions. When the official actions challenged as discriminatory include acts and decisions that do not have a firm basis in well accepted and historically sound non-discriminatory social policy, discriminatory intent may be inferred from the fact that those acts had foreseeable discriminatory consequences. As a practical matter, in school desegregation cases we can envision few official actions, other than the decision to use a neighborhood school policy for student assignment, that would not be subject to the "natural foreseeable consequences" rule.[9] The presumption is especially probative in assessing the official intent behind such affirmative

[9] As this Court recognized in *United States v. Jefferson County Board of Education*, 5 Cir. 1966, 372 F.2d 836, 879, *aff'd en banc*, 1967, 380 F.2d 385, *cert. denied*, 1967, 389 U.S. 840, 88 S.Ct. 67, 19 L.Ed.2d 103, "The neighborhood school system is rooted deeply in American culture". In *Deal v. Cincinnati Board of Education*, 6 Cir. 1966, 369 F.2d 55, 60, the Sixth Circuit summarized the sound policy reasons for the adoption and maintenance of a neighborhood school system.

> The neighborhood system is in wide use throughout the nation and has been for many years the basis of school administration. This is so because it is acknowledged to have several valuable aspects which are an aid to education, such as minimization of safety hazards to children in reaching school, economy of cost in reducing transportation needs, ease of pupil placement and

school board decisions as those concerning school locations, the construction and renovation of schools, the closing of schools, the drawing of student attendance zones, and the assignment of faculty and staff.[10]

There is language in our *Austin II* opinion that an official discriminatory intent adequate to support a finding of *de jure* segregation could be inferred solely from the school board's use of a neighborhood school policy for student assignment.[11] To the extent that *Austin II* can be so read, it is inconsistent with *Washington v. Davis* and *Arlington Heights*. The Supreme Court

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administration through the use of neutral, easily determined standards, and better home-school communication.

In his separate opinion in *Keyes v. School District No. 1, Denver, Colorado*, 1973, 413 U.S. 189, 246, 93 S.Ct. 2686, 2716, 37 L.Ed.2d 548, Justice Powell elaborated on a further desirable aspect of a neighborhood school policy.

> Neighborhood school systems, neutrally administered, reflect the deeply felt desire of citizens for a sense of community in their public education. Public schools have been a traditional source of strength to our Nation, and that strength may derive in part from the identification of many schools with the personal features of the surrounding neighborhood. Community support, interest, and dedication to public schools may well run higher with a neighborhood attendance pattern: distance may encourage disinterest.

[10]Nothing in *Washington v. Davis* or *Arlington Heights* is inconsistent with inferring a discriminatory intent from a school board's *refusal* to take action to ameliorate segregation. *See Austin II*, 532 F.2d at 389.

[11]We had in mind the misuse of a neighborhood school policy:

> At least in the Texas schools, where we have held that Mexican-American students are entitled to the same benefits of *Brown* as are blacks, school authorities may not constitutionally use a neighborhood assignment policy that creates segregated schools

recognized this ambiguity in vacating our decision and remanding the case to us.

In *Austin II*, however, we analyzed the cause and effect test used in *Austin I*, which was the same test applied in our earlier decision in *Cisneros v. Corpus Christi Independent School District*, 5 Cir. 1972, 467 F.2d 142 (en banc), *cert. denied*, 1973, 413 U.S. 920 93 S.Ct. 3053, 37 L.Ed.2d 1041. In light of *Keyes*, we expressly rejected the argument of the Mexican-American intervenors that *Keyes* did not establish that segregative intent is a *necessary* element of unconstitutional school segregation. We held, quoting from *Morales v. Shannon*, 5 Cir. 1975, 516 F.2d 411, 412-13, *cert. denied*, 1975, 423 U.S. 1034, 96 S.Ct. 566, 46 L.Ed.2d 408, that "[W]ith respect to the first

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in a district with ethnically segregated residential patterns. A segregated school system is the foreseeable and inevitable result of such an assignment policy. When this policy is used, we may infer that the school authorities have acted with segregative intent.

532 F.2d at 392. We also said:

> It has been the AISD's policy to assign students to the schools closest to their homes. The City of Austin, with the exception of the strip between East and West Austin, has ethnically segregated housing patterns. Hence, the natural, foreseeable, and inevitable result of the AISD's student assignment policy has been segregated schools throughout most of the city. Moreover, as we found in *Austin I*, "[a]ffirmative action to the contrary would have resulted in desegregation". 467 F.2d at 863. The inference is inescapable: the AISD has intended, by its continued use of the neighborhood assignment policy, to maintain segregated schools in East and West Austin. The plaintiffs have therefore established a prima facie case of *de jure* segregation of Mexican-Americans in all portions of the school district except the residentially integrated central city area.

532 F.2d at 390 (footnotes omitted).

issue, segregatory intent, we are governed by *Keyes* . . . which supervenes our holding in *Cisneros* . . . to the extent that *Keyes* requires as a prerequisite to a decree to desegregate a de facto system, . . . proof of segregatory intent as a part of state action". *Austin II*, 532 F.2d 380, 387. But it was apparent to us in both *Austin I* and *Austin II* that the AISD historically had used neighborhood schools to accentuate and to perpetuate segregation of blacks and Mexican-Americans, and that it was attempting now to absolve itself of responsibility for increasing segregation by taking shelter in a supposed neutral policy of assigning students to neighborhood schools. As the United States argued, "When [a neighborhood school] policy has been used in concert with obvious tools of discrimination, it may come to partake of a discriminatory quality and to be an instrument of discrimination itself." Brief for the United States, p. 9.

Our finding of discriminatory intent in *Austin II* was not predicated "solely" on the AISD's use of a neighborhood student assignment policy. We thought that we had made this clear in concluding:

> As articulated in *Austin I*, the case before us presents not only the use of a neighborhood assignment policy in a residentially segregated school district, but also the taking of an extensive series of actions dating back to the early twentieth century that had the natural, foreseeable, and avoidable result of creating and maintaining an ethnically segregated school system.

532 F.2d 392. *Austin* is not just a case of a school board's inaction or failure to reduce segregation because of the force of residential patterns unrelated to official board action. Here the school authorities produced more racial

and ethnic separation in the schools than in the residential patterns of the district as a whole.[12] Nevertheless, to dispel any doubt that may remain, we again set forth the findings that compel our conclusion that the AISD intentionally discriminated against Mexican-American students, adding to racial and ethnic separation.

III.

A. *The segregation of Mexican-Americans in the AISD schools.*

We observed in Austin II that "[t]he statistics paint a clear picture of the extensive segregation that still exists in the Austin schools". 532 F.2d at 390.[13] Although

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[12]We held [the en banc decision]

> "that the AISD has, in its choice of school site locations, construction and renovation of schools, drawing of attendance zones, student assignment and transfer policies, and faculty and staff assignments, caused and perpetuated the segregation of Mexican-American students within the school system."

467 F.2d at 865-66. We also found that "[t]he natural and foreseeable consequence of these actions was segregation of Mexican-Americans." 467 F.2d at 863. The Supreme Court inferred segregative intent from the same kind of circumstantial evidence in *Keyes*. *See* 413 U.S. at 192, 93 S.Ct. 2686 . The inference of segregative intent that the Supreme Court made regarding the Denver school authorities is equally applicable to their counterparts in Austin. In its memorandum opinion and order of February 2, 1976, the district court, citing Justice Powell's separate opinion in *Keyes*, 413 U.S. at 226 and 240-41, 93 S.Ct. 2686, declined to approve the construction of the proposed Southwest High School and Northeast Junior High School because the proposed schools would accentuate the desegregation problems in the district.

[13]In so finding, we confirmed the district court's finding that there was substantial segregation of Mexican-Americans in the Austin school system, *Austin II*, 532 F.2d at 389. The court found, however,

Arlington Heights cautioned that "[a]bsent a pattern as stark as that in *Gomillion* [*v. Lightfoot*, 1960, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110] or *Yick Wo* [*v. Hopkins*, 1886, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220], impact alone is not determinative, and the Court must look to other evidence[14]", the Court stated that "[t]he impact of the official action . . . may provide an important starting point[15]", in analyzing whether a discriminatory intent existed.

The AISD's report to the district court for the period ending January 15, 1977, indicates that the "clear picture of . . . extensive segregation" we discerned in *Austin II* has not faded. Of the 58,664 students attending all of Austin's schools, 60 percent (35,342) are Anglo, 16 percent (9,378) are black, and 24 percent (13,933) are Mexican-American. Almost 40 percent of the AISD's Mexican-American students attend school that have a minority enrollment of greater than 90 percent. On the high school level, 65.2 percent of the district's 17,973 students are Anglo, 14.4 percent)2,584 are black, and 20.4 percent (3,668) are Mexican-American. While 54 percent of the

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"an absence of segregatory intent or purpose toward Mexican-Americans".

[14] *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 1977, 429 U.S. at 266, 97 S.Ct. at 564. (Footnotes omitted). *See Dayton Board of Education v. Brinkman*, 1977, __ U.S. __, __, 97 S.Ct. 2766, 2772, 53 L.Ed.2d 851: "The finding that the pupil population in the various . . . schools is not homogeneous, standing by itself, is not a violation of the Fourteenth Amendment in the absence of a showing that this condition resulted from intentionally segregative actions on the part of the Board."

[15] *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. at 266, 97 S.Ct. at 564.

Mexican-American high school students attend schools that are greater than 58 percent minority, nearly two-thirds of the Anglo high school students attend schools that are greater than 78 percent Anglo. Mexican-American students fare no better in the junior high schools. Forty-seven percent of them attend either Allan Jr. High or Martin Jr. High , which are 99 percent minority and 97 minority respectively. Of the AISD's 30,275 elementary school students, 58 percent (17,692) are Anglo, 17 percent (5,122) are black, and 25 percent (7,461) are Mexican-American. Over 46 percent of the Mexican-American elementary school children attend elementary schools that have minority enrollments ranging from 91 to 100 percent; and 55 percent of the Anglo elementary school children attend schools that are over four-fifths Anglo. Of the school district's 61 elementary schools, only 23 have enrollments that are not over 80 percent Anglo or 80 percent minority.

Admittedly, the AISD's neighborhood school policy played no small part in creating and maintaining this pattern of Mexican-American segregation in the Austin schools. This is not a case, however, in which "the 'neighborhood school concept' has . . . been maintained free of manipulation". *Keyes v. School District No. 1, Denver, Colorado*, 1973, 413 U.S. 189, 212, 93 S.Ct. 2686, 2699, 37 L.Ed.2d 548. Instead, an examination of school board decisions on such matters as the construction and abandonment of schools, the selection of school sites, the assignment of faculty and staff, and the drawing of student attendance zones confirms the existence of the segregative intent that the statistics imply.

B. *The historical background of official actions taken for segregative purposes.*

Pre-*Brown*,[16] the AISD's established "Mexican" schools, just as it established "black" schools. The AISD now says that Mexicans are whites and, of course, they usually are. But the Mexican schools had all Mexican-American enrollments; few Mexican-Americans were assigned to Anglo schools. The AISD maintained the segregated identity of the schools through the use of dual-overlapping attendance zones, student assignment policies, teacher assignment policies, school site selection, and gerrymandering. The evidence clearly showed the school board's intent to segregate Mexican-American students.[17] In dual-overlapping zones Anglos attended

[16] *Brown v. Board of Education*, 1954, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873; 1955, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083.

[17] The district court, in its decision of August 1, 1973, that was the subject of our review in *Austin II*, concluded that these actions were not indicative of a segregative intent on the part of the AISD because "the existence of these schools represented no more than a humane and compassionate attempt by the School District, using educational techniques then accepted as proper and progressive, to meet the special educational needs of children who would otherwise have been much more severely handicapped in their efforts to obtain an education". The district court, however, erred in assuming that there could be no discriminatory intent where segregative actions were prompted by what at the time was thought to be benign motive. As we held in *Austin I*, 467 F.2d at 869, and reiterated in *Austin II*, 532 F.2d at 391,

> we are not convinced that, to meet the special educational needs of Mexican-American children, the AISD had to keep these children in separate schools, isolate them in Mexican-American neighborhoods, or prevent them from sharing in the educational, social, and psychological benefits of an integrated education. . . . A benign motive will not excuse the discriminatory effects of the school board's actions.

Anglo schools; Mexican-Americans attended Mexican schools. The AISD built new schools deep inside Mexican-American neighborhoods, with a capacity keyed to serving only the Mexican-Americans. We recount those actions as they were set forth in *Austin I*.

> Evidence at trial . . . reveals the existence of an all-Mexican-American school, West Avenue, as early as 1916. West Avenue shared a dual-overlapping zone with Pease, an all-white school. Whites within the zone went to Pease, and Mexican-Americans attended West Avenue. West Avenue continued to operate as a

Accord: Keyes v. School District No. 1, Denver, Colorado, 10 Cir. 1975, 521 F.2d 465, 480, *cert. denied*, 1976, 423 U.S. 1066, 96 S.Ct. 806, 46 L.Ed.2d 657 (holds that "although bilingual instruction may be required to prevent the isolation of minority students in a predominantly Anglo school system . . . such instruction must be subordinate to a plan of school desegregation"). *See McNeal v. Tate County School District*, 5 Cir. 1975, 508 F.2d 1017, disapproving ability groupings within schools that result in segregated classrooms where ability groupings are a product of a previously segregated school system. Furthermore, as the Mexican-American and black intervenors assert, "[i]t is difficult . . . to see how the segregation of Spanish-speaking children into schools and classrooms where teachers were forbidden by [Texas state] law to speak Spanish and instruction was provided in English only could have resulted from 'benign' motivation". Reply Brief of Mexican-American and Black Intervenors to Supplemental Brief Filed by the AISD at 7.

Because the district court's misapprehension of the law infected its ultimate conclusion that the AISD did not intentionally subject Mexican-American students to discrimination with an erroneous legal standard, our review of the district court's findings is not governed by the "clearly erroneous" standard of Fed.R.Civ.P. 52 (a). *Manning v. M/V "Sea Road"*, 5 Cir. 1969, 417 F.2d 603, 607. Even under the "clearly erroneous" rule, we are convinced that the district court's finding that the AISD did not intentionally discriminate against Mexican-American students would warrant reversal.

Mexican-American school until it was closed in 1947. Canal [Comal] Street School was opened in 1924. School Board minutes reflect that the school was built to accommodate Mexican-American students attending three other schools. These three schools were the only schools in the district with more than twenty Mexican-Americans.

In 1934, West Avenue and Canal [Comal] Street enrolled 45 percent of the district's Mexican-American students; Bickler had about 25 percent and Metz about 15 percent. After the passage of a bond issue Zavala school opened. The site for the new school was three blocks from the Mexican-American Canal [Comal] Street school which was then closed. Zavala shared a dual-overlapping zone with Metz, one of two predominately white schools with significant numbers of Mexican-American students. Mexican-Americans were expected to and did attend Zavala; whites attended Metz. This is unadulterated segregation. West Avenue and Zavala, predominately Mexican-American, were the only schools in the district which shared zones with other schools. By 1940, West Avenue and Zavala enrolled 56 percent of the AISD's Mexican-American students. Also at the time Zavala was built in 1935, Bickler, the other predominately white school with a significant number of Mexican-American students, was discontinued as an elementary school, and Bickler students were sent to other schools. It is unclear as to where these students went, although some were reassigned to Winn, Palm, and Metz (Zavala). In 1939, a committee from Winn complained of the assignment of Mexican-American students from Bickler to Winn.

> Soon thereafter, some of these students were reassigned to Bickler.

467 F.2d at 866-867 (footnote omitted).

C. *The post-Brown sequence of events indicating intentional racial discrimination.*

Post-*Brown* decisions by the AISD pertaining to school construction and abandonment and teacher assignment further evince the existence of a segregative intent on the part of the school board. "In ascertaining the existence of legally imposed school segregation, the existence of a pattern of school construction and abandonment is . . . a factor of great weight." *Swann v. Charlotte-Mecklenburg Board of Education*, 1971, 402 U.S. 1, 21, 91 S.Ct. 1267, 1278, 28 L.Ed.2d 554, 569. *See Keyes v. School District No. 1, Denver, Colorado*, 1973, 413 U.S. 189, 201-202, 93 S.Ct. 2686, 37 L.Ed.2d 548.

In *Austin I* we observed the following discriminatory pattern which infected both elementary and secondary public schools,

> In 1953, O'Henry Junior High School opened in the western section of Austin. At that time the zone line for Allan Junior High School, a predominately Mexican-American facility, was moved so that many whites were zoned out of Allan and into O'Henry. In 1956, Allan Junior High burned down. The new Allan Junior High School was built on the same site as the old school and opened in 1957 with 75 percent Mexican-American enrollment. In addition, the Allan Zone line was moved so that fewer whites were included in the new zone.
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> In 1960, the new Johnston High School was opened in East Austin [the predominately Mexican-American

section of Austin]. The suggestion for a central location for this facility was rejected, and the school was built deep in a Mexican-American area. It opened with a 78 percent Mexican-American enrollment. In 1967, University Junior High School was closed because the University of Texas reclaimed the property where the school was located. Martin Junior High School was built in the heart of the Mexican-American community. Again, centrally-located sites for the new facility were considered and rejected. Martin opened with 77 percent Mexican-American enrollment. White students who had formerly attended University Junior High School were zoned to predominately-white junior high schools rather than to Martin.

The elementary school zone lines have remained static in East Austin during the years following *Brown*. As a result, the schools have become increasingly overcrowded as the school population increased. Several new elementary schools have been built to relieve overcrowded conditions in areas outside of East Austin. In the seven predominately-Mexican-American schools in East Austin portable classrooms have been supplied, instead.

467 F.2d at 867 (footnote omitted).[18]

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[18]At the time of Austin I, "[t]he 39 predominately white elementary schools outside of East Austin [had] a total of 44 portable classrooms; the seven Mexican-American schools in East Austin [had] a total of 24 portables". *Austin I*, 467 F.2d 867 n.32. This disproportionate use of portable classrooms instead of new school construction to alleviate overcrowding in predominately Mexican-American schools may itself be indicative of a discriminatory intent. *See Armstrong v. Brennan*, 7 Cir. 1976, 539 F.2d 625, 631, vacated

The AISD further demonstrated its intent to segregate Mexican-Americans by assigning the district's small number of Mexican-American teachers and other professional staff to schools with predominately Mexican-American student enrollments. In *Swann*, the Supreme Court cautioned that, "[i]ndependent of student assignment, where it is possible to identify a 'white school' or a 'Negro school' simply by reference to the racial composition of teachers and staff . . . a prima facie case of violation of substantive constitutional rights under the Equal Protection Clause is shown". 402 U.S. at 18, 91 S.Ct. at 1277.[19]

We found in *Austin I* that, in 1971, "[s]ixty-five percent of the Mexican-American high school teachers, 36 percent of the Mexican-American junior high school teachers, and 77 percent of the Mexican-American elementary teachers [were] assigned to predominately Mexican-American schools". 467 F.2d at 868. Although no Austin school had

and remanded for reconsideration in the light of *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977), and *Dayton Board of Education v. Brinkman*, __ U.S. __, 97 S.Ct. 2766, 53 L.Ed.2d 851 (1977), __ U.S. __, 97 S.Ct. 2907, 53 L.Ed.2d 1044.

[19]Although the Swann Court spoke only in terms of "Negro" and "white" schools, it is established "that Hispanos [Mexican-Americans] constitute an identifiable class for purposes of the Fourteenth Amendment". *Keyes v. School District No. 1, Denver, Colorado*, 1973, 413 U.S. at 197, 93 S.Ct. at 2691. We believe that faculty segregation is especially probative of a school board's intent to discriminate because of the high degree of control school boards exercise over such matters as faculty placement. *See United States v. School District of Omaha*, 8 Cir. 1975, 521 F.2d 530, 538 n.13, *cert. denied*, 1975, 423 U.S. 946, 96 S.Ct. 361, 46 L.Ed.2d 280; *Kelly v. Guinn*, 9 Cir. 1972, 456 F.2d 100, 107.

a majority of Mexican-American faculty members, and these figures would not, by themselves, suffice to prove the AISD's intent to discriminate, they constitute another stroke in an evidentiary picture that all too clearly shows the school board's intent to discriminate against Mexican-Americans.

The plans adopted in 1955 and in the 1960's for the desegregation of black schools primarily allowed black students to transfer to Mexican-American schools but not to Anglo schools. Mexican-Americans were invariably assigned to black schools but not to Anglo schools. Ironically, the AISD argues that this policy was benign; it was to allow Mexican-Americans to be with their Spanish-speaking friends and their neighbors. But the teachers, by law, were forbidden to speak Spanish; instruction was only in English!

We find that the evidence demonstrates that the segregation of Austin's Mexican-American students was pervasive and intentional. We find it unnecessary, therefore, to determine whether absent this evidence the plaintiffs could nevertheless have made out a prima facie case of ethnic discrimination by relying on one or both of the presumptions announced by the Supreme Court in *Keyes*.[20] See *Austin II*, 532 F.2d at 390-391 n.14.

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[20]The first presumption is that "proof of state-imposed segregation in a substantial portion of the district will suffice to support a finding by the trial court of the existence of a dual system". 413 U.S. at 203, 93 S.Ct. at 2695. In tri-ethnic school districts such as Austin's, proof that one minority group was subject to statutorily enforced segregation will thus support a presumption that the other minority group was also subject to the same dual school system. The school board can overcome this presumption by showing that "the geographical structure of, or the natural boundaries within, a school district may have the effect of dividing the district into separate, identifiable and unrelated units". *Id.* The second presumption is that "even if it is determined that different areas of the school district should be viewed independently of each other", "a finding of intentionally segregative school board actions in a meaningful portion of a school system . . . creates a presumption that other segregated schooling within the system is not adventitious". 413 U.S. at 208, 93 S.Ct. at 2697. In a tri-ethnic setting, this means that a finding that intentional segregation was practiced against one minority group raises the presumption that any segregation suffered by the second minority group was intentional.

IV.

We have concluded for the third time, that the AISD intentionally discriminated against Mexican-Americans; that the district court applied an erroneous legal standard in assuming that there could not be discriminatory intent when the actions were prompted by what was thought at the time to have been a benign motive; that the district court's finding as to intent was erroneous. Our reconsideration of the case in light of *Washington v. Davis* complies with the mandate of the Supreme Court.

The Supreme Court's recent decision in *Dayton Board of Education v. Brinkman*, __ U.S. __, 97 S.Ct. 2766, 53 L.Ed. 851 (1977) requires us again to remand the case to the district court for a hearing. In *Dayton*, the Court specifically addressed the question of "the proper allocation of functions between the district courts and the courts of appeals within the federal system"[21], and instructed that once a constitutional violation is found in a school desegregation case,

> *the District Court in the first instance*, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations

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[21]__ U.S. at __, 97 S.Ct. at 2770.

> had on the racial distribution of the . . . school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy. (Emphasis added.)

__ U.S. at __, 97 S.Ct. at 2775.

Assessing the incremental segregative impact of a school board's discriminatory actions and policies is not an easy task. The district court, on remand, must take into account that

> [p]eople gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner-city neighborhoods.

Swann v. Charlotte-Mecklenburg Board of Education, 1971, 402 U.S. 1, 20-21, 91 S.Ct. 1267, 1278, 28 L.Ed.2d 554. The burden of demonstrating that the residential concentration of minorities in East Austin is unrelated to the AISD's segregative school policies is to be shouldered by the school board. *See Keyes v. School District No. 1, Denver, Colorado*, 1973, 413 U.S. at 211 n.17, 93 S.Ct. 2686.

"[T]he burden of state officials is that set forth in *Swann* — to take the necessary steps 'to eliminate from the public schools all vestiges of state-imposed segregation'. 402 U.S. at 15." *Milliken v. Bradley*, __ U.S. __, 97 S.Ct. 2749, 2762, 53 L.Ed.2d 745 (1977). The remedy, of course,

must be tailored to fit the nature of the violation.[22] If the district court finds that the incremental segregative effects of the AISD's intentional actions discriminating against Mexican-Americans have a systemwide impact on the racial distribution of the Austin school population, then the scope of the remedy must also be systemwide. In assessing the extent of the impact, the district court should keep in mind the Supreme Court's statement in *Keyes* that "racially inspired school board actions have an impact beyond the particular schools that are the subjects of those actions."[23] 413 U.S. at 203, 93 S.Ct. at 2695. The partial desegregation of a single grade has no basis in logic or in

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[22]The standard set by *Swann* is "that the scope of the remedy is determined by the nature and extent of the constitutional violation." 402 U.S. at 16. *Milliken II* explains: "The well-settled principle that the nature and scope of the remedy is to be determined by the violation means simply that federal court decrees must directly address and relate to the constitutional violation itself. . . . [W]here, as here, a constitutional violation has been found, the remedy does not 'exceed' the violation if the remedy is tailored to cure the '*condition*' that offends the Constitution." (Emphasis supplied.) *Milliken v. Bradley*, __ U.S. __, 97 S.Ct. 2758.

[23]In devising an appropriate plan, it seems to us important for the AISD and the district court to bear in mind that in the setting of a school case the plaintiffs are not just aggrieved individuals; they represent the "collective will." *Hart v. Community School Board*, 2 Cir. 1975, 512 F.2d 37. "Segregation is a group phenomenon . . . [A]s a group wrong . . . the mode of redress must be group-wide to be adequate." Note, 20 U.Chi.L.Rev. 577 (1953). *See also*, Meador, The Constitution and the Assignment of Pupils to Public Schools, 45 Va.L.Rev. 517, 523 (1959). What we said in *Jefferson* about blacks applies equally to Mexican-Americans in certain states: "Negroes collectively are harmed when the state, by law or custom, operates segregated schools or a school system with uncorrected effects of segregation. Denial of access to the dominant culture, lack of opportunity in any meaningful way to participate in political and other

equity as a remedy suited and sufficient to rectify the constitutional deprivations inflicted by segregating school children. It is an affront to *Brown, Green v. New Kent, Alexander v. Holmes, Swann, and Keyes*,[24] to say nothing of this Court's long and consistent record of affording minorities an opportunity to enter the mainstream of American life by affording them an equal opportunity with whites for an education.

The district court should give the hearing on remedy a high docket priority. All parties should be free to introduce such additional testimony and other evidence as the district court may consider appropriate. All remedial measures currently in effect shall remain in effect pending the district court's decision on remedy.

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public activities, the stigma of apartheid condemned in the Thirteenth Amendment are concomitants of the dual educational system. The unmalleable fact transcending in importance the harm to individual Negro children is that the separate school system was an integral element in the Southern State's general program to restrict Negroes as a class from participation in the life of the community, the affairs of the State, and the mainstream of American life: Negroes must keep their place." *United States v. Jefferson County Board of Education*, 1966, 5 Cir., 372 F.2d 836 at 866, *aff'd on reh. en banc* 380 F.2d 385 *cert. denied*, 389 U.S. 840, 88 S.Ct. 67, 19 L.Ed.2d 103.

[24]See citations in fn. 1. "[T]his Court has, with limited exceptions, disapproved of school board plans which exclude a certain age grouping from school desegregation." *Arvizu v. Waco Independent School District*, 5 Cir. 1974, 495 F.2d 499, 503.

SUPREME COURT OF THE UNITED STATES

AUSTIN INDEPENDENT SCHOOL DISTRICT

v.

UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NO. 76-200. Decided December 6, 1976

PER CURIAM.

The petition for certiorari is granted, the judgment of the Court of Appeals for the Fifth Circuit is vacated, and the case is remanded for reconsideration in light of *Washington v. Davis*, 426 U.S. 229 (1976).

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST join, concurring.

I concur in the action of the Court, and agree that there would be no need to address the issue of remedy if the Court of Appeals upon reconsideration of its opinion in light of *Washington v. Davis*, 426 U.S. 229 (1976), should conclude that there was no constitutional violation. I would nonetheless include the issue of remedy in the remand order because of what appears to be a misapplication of a core principle of desegregation cases. In such cases, this Court has repeatedly emphasized that

> "the task is to correct by a balancing of the individual and collective interests, 'the condition that offends the Constitution.' A federal remedial power may be exercised 'only on the basis of a constitutional violation' and, '[a]s with any equity case, the nature of the violation determines the scope of the remedy.' " *Milliken v. Bradley,* 418 U.S. 717, 738 (1974), quoting *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 16 (1971).

As suggested by this Court's remand premised upon *Washington v. Davis, supra,* the Court of Appeals may have erred by a readiness to impute to school officials a segregative intent far more pervasive than the evidence justified.[1] That court also seems to have erred in ordering a desegregation plan far exceeding any identifiable violations of constitutional rights.

As is true in most of our larger cities with substantial minority populations, Austin has residential areas in

[1]Although in an earlier stage in this case other findings were made which evidenced segregative intent, see, *e.g., United States v. Texas Education Agency,* 467 F.2d 848, 865-869 (CA5 1972) (actions by school authorities contributing to segregation of Mexican-American students), the opinion below apparently gave controlling effect to the use of neighborhood schools:

"At least in the Texas schools, where we have held that Mexican-American students are entitled to the same benefits of *Brown* as are blacks, school authorities may not constitutionally use a neighborhood assignment policy creating segregated schools in a district with ethnically segregated residential patterns. A segregated school system is the foreseeable and inevitable result of such an assignment policy. When this policy is used, we may infer that the school authorities have acted with segregative intent." App. to Pet. for Cert., at 20.

which certain racial and ethnic groups predominate in the population. Residential segregation creates significant problems for school officials who seek to achieve a nonsegregated school district. In Austin those problems are perhaps accentuated by the geography of the city. Acknowledging these difficulties, the Court of Appeals noted that

> "[c]ountless efforts by school officials, consultants, and visiting teams have found it impossible to produce significant desegregation by boundary line changes, contiguous pairing of schools, magnet schools, or other effective means short of cross-town busing incident to non-contiguous pairing of . . . schools. . . ." App. to Pet. for Cert., at 26.

The Court of Appeals then concluded that nothing short of extensive cross-town transportation would suffice.

Designed to achieve a degree of racial balance in *every* school in Austin,[2] the desegregation plan endorsed by the Court of Appeals is remarkably sweeping. For kindergarten through eighth grade, the plan requires cross-

[2]Apparently misconceiving the import of language in *Green v. County School Board of New Kent County,* 391 U.S. 430, 442 (1968), to the effect that there should be no "Negro" school or "white" school, the Court of Appeals seems to believe every school must be racially balanced to some degree. *Green* involved a rural, sparsely populated county with only two schools. Much of its language is irrelevant to a large urban school system. Moreover, the effect of applying the language of *Green* to such a system may be to stigmatize — without justification — schools that can be identified as having a racial or ethnic majority. The Solicitor General, speaking for the United States in this case, commented that "there is nothing inherently inferior about all-black schools, any more than all-white schools are inferior, when the separation is not caused by state action." Brief for the United States, at 8 n. 5.

town busing of all students in schools that are over 50% minority or 90% Anglo.[3] For kindergarten through fourth grade, the students in East Austin attending the relevant schools will be bused through the congested center of the city to West Austin. For fourth through eighth grade, the flow will be reversed. The high schools will be integrated by a system of "feeder" schools. This plan requiring transportation of from 18,600 to 25,000 students, consisting of from 32% to 42% of the entire school population,[4] was ordered despite the District Court's

[3]This "triggering" condition of the plan requires further comment. Describing it, the Court of Appeals stated as follows:

"Elementary and junior high schools that are between 50 and 90 percent Anglo are defined as 'naturally desegregated' and would remain unchanged. *When changing demographic patterns cause any of these schools to fall outside of the 'naturally desegregated' range, the schools would be brought within the Finger Plan 4-4-4 system.*" App. to Pet. for Cert., at 28 (emphasis added).

This aspect of the plan clearly reveals that the plan is designed to achieve some predetermined racial and ethnic balance in the schools rather than to remedy the constitutional violations committed by the school authorities. As described by the Court of Appeals, the plan is impermissible under our holding *Pasadena City Board of Education v. Spangler*, __ U.S. __ (1976).

[4]In defending the high percentage of children proposed to be bused in Austin, the Court of Appeals relied on superficially comparable percentages of children that were to be transported under the plan approved in *Swann*. The school district before the Court in *Swann* included Mecklenburg County as well as the city of Charlotte. As the Court said: "The area is large — 550 square miles — spanning roughly 22 miles east-west and 36 miles north-south." 402 U.S., at 6. Although it included a metropolitan area, much of the district was rural, requiring the transportation of pupils quite apart from desegregative efforts. Because of this situation in *Swann*, it is unduly simplistic to compare the percentages of children bused. The situation in Austin in simply not comparable.

conclusion that such a plan would involve a "risk to health and probable impingement of education for students younger than the sixth grade...." App. to Pet. for Cert., at 53.

Whether the Austin school authorities intentionally discriminated against minorities or simply failed to fulfill affirmative obligations to eliminate segregation, see *Keyes v. School District No. 1, Denver, Colorado*, 413 U.S. 189, 217-253 (1973), (POWELL, J., concurring in part and dissenting in part), the remedy ordered appears to exceed that necessary to eliminate the effect of any official acts or omissions. The Court of Appeals did not find and there is no evidence in the record available to us to suggest that, absent those constitutional violations, the Austin school system would have been integrated to the extent contemplated by the plan. If the Court of Appeals believed that this remedy was coextensive with the constitutional violations, it adopted a view of the constitutional obligations of a school board far exceeding anything required by this Court.

The principal cause of racial and ethnic imbalance in urban public schools across the country — North and South — is the imbalance in residential patterns. Such residential patterns are typically beyond the control of school authorities. For example, discrimination in housing — whether public or private — cannot be attributed to school authorities. Economic pressures and voluntary preferences[5] are the primary determinants of residential patterns.

[5]See *Keyes*, 413 U.S., at 224-253 (POWELL, J., concurring in part and dissenting in part). The tendency of citizens of common national or ethnic origins to form homogeneous residential patterns in our cities is a familiar demographic characteristic of this country.

I do not suggest that transportation of pupils is never a permissible means of implementing desegregation.[6] I merely emphasize the limitation repeatedly expressed by this Court that the extent of an equitable remedy is determined by and may not properly exceed the effect of the constitutional violation. Thus, large-scale busing is permissible only where the evidence supports a finding that the extent of integration sought to be achieved by busing would have existed had the school authorities fulfilled their constitutional obligations in the past. Such a standard is remedial rather than punitive, and would rarely result in the widespread busing of elementary-age children.[7] A remedy simply is not equitable if it is disproportionate to the wrong.

MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL dissent because they are persuaded that the Court of Appeals correctly interpreted and applied the relevant decisions of this Court.

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[6]See *id.*, at 242-252.

[7]A related equitable principle, also applicable in fashioning a desegregation remedy, is that a court has the duty to "balanc[e] . . . the individual and collective interests." *Milliken v. Bradley*, 418 U.S., at 738. The individual interests at issue here are as personal and important as any in our society. They relate to the family, and to the concern of parents for the welfare and education of their children — especially those of tender age. Families share these interests wholly without regard to race, ethnic origin, or economic status. It also is to be remembered, in granting equitable relief, that a desegregation decree is unique in that its burden falls not upon the officials or private interests responsible for the offending action but, rather, upon innocent children and parents.

UNITED STATES of America,
Plaintiff-Appellant,

Dedra Estell Overton et al.,
Intervenors-Appellants,

v.

TEXAS EDUCATION AGENCY et al.,
(Austin Independent School District),
Defendants-Appellees.

No. 73-3301.

United States Court of Appeals,
Fifth Circuit

May 13, 1976

WISDOM, Circuit Judge:

The United States and various black and Mexican-American intervenors have challenged the student assignment policies of the Austin Independent School District (AISD). This is the second time this case has come before us. In 1972, our en banc Court remanded the case to the district court with directions to eliminate all discriminatory segregation against black and Mexican-American students and to establish a unitary school system in Austin. *United States v. Texas Education Agency*, 5 Cir., 467 F.2d 848 (*Austin I*). At the time of that decision, the AISD was 65 percent Anglo, 20 percent Mexican-American, and 15 percent black. Eighty-three percent of the black students and 58 percent of the Mexican-

Americans attended schools that contained over three-fifths minority[1] students. The district court, on remand from our en banc decision, adopted the desegregation plan submitted by the AISD. This plan has had two years of operation to prove itself. The school system is now 62 percent Anglo, 23 percent Mexican-American, and 15 percent black. Forty-two percent of the black Austin students and 45 percent of the Mexican-Americans still attend schools that are over three-fifths minority. Progress has been made. But the AISD is far from a unitary system.

This Austin case differs from the one we considered in 1972 in two respects. First, we must weigh the effect of the Supreme Court decision in *Keyes*[2] on the burdens of the plaintiffs and defendants. Second, we must measure the constitutional sufficiency of the new desegregation plans the AISD and the intervenors have submitted.

I. PROCEDURAL HISTORY

This school desegregation case was filed in August 1970 by the United States against the Texas Education Agency and seven school districts, including the AISD. The complaint alleged that (1) historically, the defendants had operated a dual system based on race, and continued to do so, and (2) the defendants discriminatorily assigned Mexican-Americans to schools identifiable as Mexican-American schools or as schools intended for blacks and

[1]The term "minority" is used to refer collectively to Mexican-American and black students.

[2]*Keyes v. School District No. 1*, Denver, Colorado, 1973, 413 U.S. 189, 93 S.Ct. 2686, 37 L.Ed.2d 548.

Mexican-Americans. Certain blacks and Mexican-Americans intervened on their own behalf and as representatives of those similarly situated.

After the parties and the United States Department of Health, Education, and Welfare were unable to agree on a desegregation plan, the district court consolidated a hearing that took place June 14 to June 21, 1971. The court held that there had been no *de jure* discrimination against Mexican-Americans and afforded them no relief. It then held that the "vestiges of a dual system continue to exist with respect to blacks" and adopted, with minor modifications, the AISD plan for establishing a unitary school system in Austin. The high schools and junior high schools were to be desegregated primarily by busing about 2200 blacks to previously predominantly white schools. The elementary schools were "clustered" into groups of six schools each. One week per month the students of each cluster were to meet together to engage in certain planned activities. The district court found "that elementary students would be in a desegregated environment as much as twenty-five (25) percent of the school year".

This Court, sitting en banc, reversed and remanded the case to the district court with directions to eliminate the unconstitutional segregation of Mexican-American and black students "at once". 467 F.2d at 883. We held that the AISD had caused and perpetuated the segregation of blacks within the school system and that it had not dismantled this dual system. The Court further held that the educational status of Mexican-American students was inferior to that of their Anglo counterparts and that Mexican-Americans in Austin were a separate ethnic minority within the ambit of the Equal Protection Clause. Because

school authorities, by their actions, contributed to the segregation of Mexican-Americans in the Austin schools, we held that these students were denied the equal protection of the laws.

The en banc Court divided only on the issue of remedy. A majority of the Court directed the district court to eliminate the dual school system and itemized a hierarchy of desegregation tools that the court should consider using. Six judges dissented: "The majority opinion . . . [is] an example of how a reviewing court can pass the buck, give the school board a delay, and confuse the district court on remand." 467 F.2d at 888. This evaluation has to some extent been borne out by later events. The district judge admitted to the attorneys in this case that he was baffled by the majority opinion on remedy and asked for help in interpreting it. The response of the attorneys (of both the intervening appellants and the AISD) was to move for clarification of this Court's mandate. The motion was denied over the dissent of five judges. *United States v. Texas Education Agency*, 5 Cir. 1973, 470 F.2d 1001 (en banc).

On August 3, 1972, the day after our en banc decision was issued, the district court ordered the parties to hold a pre-trial conference within five days to discuss the possibility of joining in the submission of a single desegregation plan to that court. If no agreement could be reached, the AISD, the United States, and the intervenors were ordered to the district court on that day that it was "unable to submit a desegregation plan at this time" and recommended to the court "that local officials be given the opportunity to formulate and submit a plan to the Court before the Court or other parties consider alternatives or modifications to such a plan". On the same

day, the intervenors and the AISD filed desegregation plans. The Government has yet to file any plan.

The AISD's plan would establish six sixth grade centers that would draw all sixth-graders in the school district. The intervenors' plan would require the busing of all kindergarten (K)-to-fourth-grade students at the predominantly minority schools in East Austin to new grade K-4 schools in West Austin, and the busing of all fifth-to-eighth-grade students at predominantly Anglo schools in West Austin to new grade 5—8 schools in East Austin. The plan would also close the one predominantly minority high school remaining in Austin (Johnston) and bus its students to the remaining high schools. The black intervenors added an objection to the 1971 closing of the black high school (Anderson) and black junior high school (Kealing) in Austin, and requested that the schools be reopened and used in any desegregation plan adopted by the court. The district judge conducted the trial for twelve days in May, 1973. He issued a "Memorandum Opinion and Order" on August 1, 1973.

The district court first held that, because the AISD had, in the past, intentionally segregated black students, it must now dismantle its dual system based on race. Second, the court held that its finding of past intentional segregation of blacks constituted a prima facie case of intentional segregation of Mexican-Americans. It concluded, however, that the AISD had successfully rebutted this prima facie case by demonstrating that its racial policies were unrelated to its treatment of Mexican-Americans and that there was an absence of segregative intent toward Mexican-Americans. The court, relying on *Keyes v. School District No. 1, Denver, Colorado,* 1973, 413

U.S. 189, 93 S.Ct. 2686, 37 L.Ed.2d 548, held that it would therefore be improper to order "all-out desegregation" of Mexican-Americans. The court then rejected the black intervenors' challenge of the closing of Anderson and Kealing schools and adopted, with minor modifications, the AISD's plan for establishing an integrated school system. Because Mexican-American students are an identifiable minority entitled to equal protection of the laws, the court further held that they were entitled to equal educational opportunties, including the setting up of special educational programs, such as bilingual and bicultural education.

The United States and the plaintiff-intervenors have appealed from this Memorandum Opinion and Order of the district court.

II. SEGREGATION OF MEXICAN-AMERICANS

A. The *Keyes* Case

[1-3] The Supreme Court held in *Brown v. Board of Education,* 1954, 347 U.S. 483, 495, 74 S.Ct. 686, 692, 98 L.Ed. 873, 881, that educational facilities segregated on the basis of race are inherently unequal. In *Keyes v. School District No. 1, Denver, Colorado,* 1973, 413 U.S. 189, 195-98, 93 S.Ct. 2686, 2690-2692, 37 L.Ed.2d 548, 555-557, the Court extended this principle to the segregation of Mexican-Americans in the Denver school system. The unequal educational status of these minorities does not constitute a violation of the Equal Protection Clause of the Fourteenth Amendment unless it results from "state action". The term of art that has long described the state action requirement in the school desegregation context is "*de jure* segregation", which the Supreme Court has defined as "a current condition of segregation resulting from intentional state action directed specifically to the [segregated] schools". *Keyes,* 413 U.S. at 205-06, 93 S.Ct. at 2697, 37 L.Ed.2d at 561. *See generally Cisneros v. Corpus Christi Independent School District,* 5 Cir. 1972, 467 F.2d 142, 148 (en banc), *cert. denied,* 1973, 413 U.S. 920, 93 S.Ct. 3053, 37 L.Ed.2d 1041. To establish a prima facie case of unlawful school segregation, the plaintiffs must therefore prove (1) that there is segregation in public schools, (2) that state officials have, with segregative intent, taken or refrained from taking certain actions, and (3) that the present segregated system is a result of that action or inaction.[3]

[3]The eight concurring judges in *Austin I* held:

> The power of the district court will depend first upon a finding of the proscribed discrimination in the school system. . . . In determining the fact of discrimination *vel non* . . . , the district court must identify the school or schools which are segregated as a result of such discrimination . . . The importance of such a determination will be seen in some populous school districts embracing large geographical areas. There may be segregated schools which are the result of unconstitutional statutes or of official action. There may be other one race schools which are the product of neutral, non-discriminatory forces.

467 F.2d at 884. To the extent that this holding requires a court to identify the intentional state action that segregated a school as a prerequisite to including that school in a desegregation plan, the holding was unambiguously supervened by *Keyes.* The Supreme Court there stated:

> We have never suggested that plaintiffs in school desegregation cases must bear the burden of proving the elements of *de jure* segregation as to each and every school or each and every student within the school system. . . . [W]here plaintiffs prove that the school authorities have carried out a systematic program of segregation affecting a substantial portion of the students, schools, teachers, and facilities within the school system, it is on-

The remainder of the *Keyes* opinion considers whether proof of *de jure* segregation in a portion of the Denver school district is sufficient to establish a system-wide constitutional violation. This section of *Keyes* is irrelevant to our disposition of the case before us because we hold below that the plaintiffs have proved that intentional segregation exists throughout the Austin school district.

B. The *Cisneros-Austin I* Test

We found in *Austin I* that Mexican-American students in Austin had received an education inferior to that of their Anglo counterparts and that this was the result of ethnic segregation. 467 F.2d at 862–63 & n.21. This would constitute an equal protection violation, we held, only if the "school authorities, by their actions, [had] contribute[d] to segregation in education, whether by causing additional segregation or maintaining existing segregation . . . ." 467 F.2d at 863–64. Our ultimate decision against the AISD was based in part on our finding that "[t]he natural and foreseeable consequence of [its] actions was segregation of Mexican-Americans". 467 F.2d at 863. We held, however, that, to establish an equal protection violation, it is not necessary to prove discriminatory intent when there is discriminatory effect. 467 F.2d at 864–65 n.25.

Although, in *Cisneros*, we discarded "the anodyne dichotomy of classical de facto and de jure segregation", the rationale of that decision was very similar to that of

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ly common sense to conclude that there exists a predicate for a finding of the existence of a dual school system.

413 U.S. at 200, 201, 93 S.Ct. at 2694, 37 L.Ed.2d at 558.

Austin I. The Court held that, in order to sustain a constitutional violation,

> [we] need only find a real and significant relationship, in terms of cause and effect, between state action and the denial of educational opportunity occasioned by the racial and ethnic separation of public school students.

Id. As in *Austin I*, we held that "[d]iscriminatory motive and purpose . . are not necessary ingredients of constitutional violations in the field of public education". 467 F.2d at 149. And, in language reminiscent of the *Austin I* "foreseeable consequences" approach, the Court found the requisite state action in *Cisneros* in the Board's imposition of "a neighborhood school plan, *ab initio*, upon a clear and established pattern of residential segregation in the face of an obvious and inevitable result". *Id.*

Thus, *Austin I* and *Cisneros* both applied cause-and-effect tests for finding the state action that is a prerequisite to establishing a constitutional violation. But, in both cases, this test was applied in the context of school board actions that led to the "foreseeable" and "inevitable" result of segregated schools.

C. The Impact of *Keyes* on the *Cisneros-Austin I* Test

The Mexican-American intervenors argue that the cause-and-effect test need not fall by the wayside after *Keyes* because that case does not establish that segregative intent is a necessary element of unconstitutional school segregation. The intervenors point out that the *Keyes* holding is limited by the plaintiffs' concession in that case that they had the burden of proving intentional state action and by the obvious segregative purpose of the Denver school authorities. *See generally Hart v. Community*

School Board of Education, New York School District #21, 2 Cir. 1975, 512 F.2d 37, 49; Comment, Public School Segregation and the Contours of Unconstitutionality: The Denver School Board Case, 45 Colo. L.Rev. 457, 475 (1974). This Court has already rejected this argument. In *Morales v. Shannon,* 5 Cir. 1975, 516 F.2d 411, 412–13, *cert. denied,* 1975, —— U.S. ——, 96 S. Ct. 566, 46 L.Ed.2d 408, 44 U.S.L.W. 3358, we held:

> [W]ith respect to the first issue, segregatory intent, we are governed by *Keyes* . . . , which supervened our holding in *Cisneros* . . . , to the extent that *Keyes* requires, as a prerequisite to a decree to desegregate a de facto system, . . . proof of segregatory intent as a part of state action.

Morales also compels rejection of the intervenors' argument that the *Cisneros-Austin I* test for the constitutional violation is the "functional equivalent" of the *Keyes* test. To the extent that *Cisneros* and *Austin I* applied cause-and-effect tests and rejected the requirement of a showing of discriminatory intent, those cases were supervened by *Keyes.*

[4] But the intervenors also argue that, although this Court in *Cisneros* and *Austin I* refused to search for the defendants' express or specific intent, we did not discard intent as an element of the equal protection violation. The intervenors contend that intent could be inferred in those cases from our findings that segregation was the "inevitable result" and the "foreseeable consequence" of the school boards' actions. Whatever may have been the originally intended meaning of the tests we applied in *Cisneros* and *Austin I,* we agree with the intervenors that, after *Keyes,* our two opinions must be viewed as incorporating in school segregation law the ordinary rule of tort law that

a person intends the natural and foreseeable consequences of his actions.[4] This reading of *Cisneros* and *Austin I* is faithful to the *Keyes* requirement of proof of segregative intent. *See* Comment, 45 Colo. L.Rev. at 464 (1974). *But see* Comment, *Keyes v. School District No. 1*: Unlocking the Northern Schoolhouse Doors, 9 Harv.Civ.Rights-Civ.Lib.L.Rev. 124, 149 n.99 (1974).

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[4]Prosser states the tort rule that "[i]ntent . . . extend[s] not only to those consequences which are desired, but also to those which the actor believes are substantially certain to follow from what he does". The Law of Torts § 8, at 31 (4th ed. 1971). The rule has also been applied in many other areas. *See, e.g., NLRB v. Great Dane Trailers,* 1967, 388 U.S. 26, 33, 87 S.Ct. 1792, 1797, 18 L.Ed.2d 1027, 1034 *quoting NLRB v. Erie Resistor Corp.,* 1963, 373 U.S. 221, 227, 228, 231, 83 S.Ct. 1139, 1144, 1145, 1147, 10 L.Ed.2d 308, 313, 314, 316 (discrimination against labor union member in violation of §8(a)(3) of the National Labor Relations Act):

> Some conduct . . . is so 'inherently destructive of employee interests' that it may be deemed proscribed without need for proof of an underlying improper motive. . . . That is, some conduct carries with it 'unavoidable consequences which the employer not only foresaw but which he must have intended' and thus bears 'its own indicia of intent.'

Gomillion v. Lightfoot, 1960, 364 U.S. 339, 341, 347, 81 S.Ct. 125, 127, 130, 5 L.Ed.2d 110, 113, 116 (unconstitutionality of state statute redefining the boundaries of the City of Tuskegee), where, based on its observation that the "inevitable effect" of the redefinition of the City's boundaries was to remove almost all of its black voters, the Court observed that "the legislation is solely *concerned with*" segregating whites and blacks so as to deprive blacks of their vote, and that, *"to that end* [the Legislature] has incidentally changed the city's boundaries". (emphasis added). *Miller v. Milwaukee,* 1927, 272 U.S. 713, 715, 47 S.Ct. 280, 71 L.Ed. 487, 489 (validity of indirect state tax on federally tax-exempt income): "A result intelligently foreseen and offering the most obvious motive for an act that will bring it about, fairly may be taken to have been a purpose of the act."

Apart from the need to conform *Cisneros* and *Austin I* to the supervening *Keyes* case, there are other reasons for attributing responsibility to a state official who should reasonably foresee the segregative effects of his actions. First, it is difficult—and often futile—to obtain direct evidence of the official's intentions. Rather than announce his intention of violating antidiscrimination laws, it is far more likely that the state official "will pursue his discriminatory practices in ways that are devious, by methods subtle and illusive—for we deal with an area in which 'subleties of conduct . . . play no small part'". *Holland v. Edwards*, 1954, 307 N.Y. 38, 45, 119 N.E.2d 581, 584. *See also United States v. O'Brien*, 1968, 391 U.S. 367, 383-85, 88 S.Ct. 1673, 1682-1683, 20 L.Ed.2d 672, 683-684; Brest, Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive, 1971 Sup.Ct. Rev. 95, 124. Hence, courts usually rely on circumstantial evidence to ascertain the decisionmakers' motivations.[5]

[5] Second, in *Monroe v. Pape*, 1961, 365 U.S. 167, 187, 81 S.Ct. 473, 484, 5 L.Ed.2d 492, 505, the Supreme Court rejected the argument that specific intent is a necessary element of the cause of action under 42 U.S.C. §

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[5] *See* Brest, 1971 Sup.Ct.Rev. at 120-21.

> The process does not differ from that of inferring ultimate facts from basic facts in other areas of the law. It is grounded in an experiential, intuitive assessment of the likelihood that the decision was designed to further one or another objective.

Id. at 121. *See also* Developments in the Law—Equal Protection, 82 Harv.L.Rev. 1065, 1077 (1969). Indeed, in *Keyes* the Supreme Court inferred the School Board's segregative intent with respect to one section of Denver (the core city) from evidence of intentional segregation in another area (Park Hill).

1983, the statute under which many school desegregation cases are brought. The Court held that § 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions". *Id.* We find no inconsistency between the rule applied in *Monroe v. Pape* and that applied in *Keyes*, nor do we find any reason for applying a standard different from *Monroe v. Pape* in school desegregation cases.[6] *See* Ely, Legislative and Administrative Motivation in Constitutional Law, 79 Yale L.J. 1205, 1292 n.258 (1970).

[6] One final word need be added about our *Austin I* formulation. Our holding that there was unlawful state-imposed segregation was based in part on our finding that affirmative action by the school authorities could have resulted in desegregation. 467 F.2d at 863. The AISD criticizes this approach because it would put

> virtually all school districts . . . under massive desegregation orders. Racial and ethnic imbalances occur wherever there are racial or ethnic minorities, and no school district can measure up to a standard which requires that it have taken affirmative action to

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[6] We are not the first circuit to read the "natural and foreseeable consequences" test into the *Keyes* requirement of segregative intent. *See, e.g., Hart v. Community School Board of Education, New York School District #21*, 2 Cir. 1975, 512 F.2d 37, 50-51; *Morgan v. Kerrigan*, 1 Cir. 1974, 509 F.2d 580, *cert. denied*, 1975, 421 U.S. 963, 95 S.Ct. 1950, 44 L.Ed.2d 449; *Oliver v. Michigan State Board of Education*, 6 Cir. 1974, 508 F.2d 178, 182, *cert. denied*, 1975, 421 U.S. 963, 95 S.Ct. 1950, 44 L.Ed.2d 449. *But see Soria v. Oxnard School Board of Trustees*, 9 Cir. 1973, 488 F.2d 579, 585, *cert. denied*, 1974, 416 U.S. 951, 94 S.Ct. 1961, 40 L.Ed.2d 301. *See generally* Fiss, School Desegregation: The Uncertain Path of the Law, 4 Phil. & Pub. Affairs 3 (1974).

promote the integration of all racial and ethnic minorities throughout its history.

Our holding in *Austin I* placed no such burden on school boards. Our statement about affirmative action immediately followed our finding that the foreseeable consequence of various actions of the AISD was the segregation of Mexican-Americans. Hence, our holding of unlawful segregation was based on the foreseeability and avoidability of that segregation. *See* Fiss, The Charlotte-Mecklenburg Case—Its Significance for Northern School Desegregation, 38 U.Chi.L.Rev. 697, 706 (1971). Many circuits have taken this approach.[7] In any event, it should be clear after *Keyes* that the refusal of school authorities to take affirmative action that would desegregate the school system may be probative of the segregative intent underlying various actions of those officials.[8]

D. The Prima Facie Case of Unlawful Segregation of Mexican-Americans in Austin

[7] 1. *Segregation in the schools.* The district court found that there was substantial segregation of Mexican-Americans in the Austin school system. That finding is

[7] *See, e.g., Hart,* 512 F.2d at 50; *Morgan,* 509 F.2d at 585-86; *Oliver,* 508 F.2d at 187; *United States v. Board of School Commissioners of Indianapolis, Indiana,* 7 Cir. 1973, 474 F.2d 81, 89 *cert. denied,.* 1973, 413 U.S. 920, 93 S.Ct. 3066, 37 L.Ed.2d 1041.

[8] Justice Powell, in a separate opinion, made the following observations about the approach of the *Keyes* majority: The Court "searches for *de jure* action in what the Denver School Board has done or failed to do". *Keyes,* 413 U.S. at 230, 92 S.Ct. at 2708, 37 L.Ed.2d at 575. "Every act of a school board and school administration, and indeed every failure to act where affirmative action is indicated, must now be subject to scrutiny." 413 U.S. at 234, 93 S.Ct. at 2710, 37 L.Ed.2d at 578.

not clearly erroneous. Our Court has held that "[u]nder *Keyes* . . . and *Cisneros* . . . , schools in Texas with a combined predominance of black and Mexican-American students are eligible to be classified as 'segregated schools'."[9] The statistics paint a clear picture of the extensive segregation that still exists in the Austin schools.[10] Of the 41, 174 students attending one of the 70 elementary and junior high schools in Austin, 16 percent (6590) are black, 24 percent (9950) are Mexican-American, and 60 percent (24,634) are Anglo. About 52 percent (3396) of the black pre-high school students and over 54 percent (5380) of the Mexican-American pre-high school students attend one of the 18 schools that is over three-fifths minority. Over 47 percent (11,610) of the Anglo pre-high school students in Austin attend one of the 24 schools that is over four-fifths Anglo.[11] Of the 17,746 public high school students in Austin, 14 percent (2520) are black, 19 percent (3316) are Mexican-American, and 67 percent (11,910) are Anglo. About 17 percent (423) of the black high school students and over 30 percent (1003) of the

[9] *Arvizu v. Waco Independent School District,* 5 Cir. 1974, 495 F.2d 499, 505 N. 10. *See also Keyes,* 413 U.S. at 197, 93 S.Ct. at 2691, 37 L.Ed.2d at 556.

[10] In citing these statistics, we recall the words of *United States v. Jefferson County Bd. of Educ.,* 5 Cir. 1966, 372 F.2d 836, 887, *aff'd en banc,* 1967, 380 F.2d 387, *cert. denied,* 1967, 389 U.S. 840, 88 S.Ct. 67, 19 L.Ed.2d 103:

> A similar inference [of deliberate discrimination against Negroes] may be drawn in school desegregation cases, when the number of Negroes attending school with white children is manifestly out of line with the ratio of Negro school children to white school children in public schools.

[11] Another 18 percent (4358) of the Anglo elementary and junior high school students attend one of the 8 schools that is between 75 and 80 percent Anglo.

Mexican-American students attend Johnston High School, which is 99 percent minority. Over 55 percent (655) of the Anglo high school students in Austin attend one of the 3 schools that is over four-fifths Anglo.

[8] 2. *Segregative actions taken with segregative intent.* It has been the AISD's policy to assign students to the schools closest to their homes. The City of Austin, with the exception of the strip between East and West Austin, has ethnically segregated housing patterns.[12] Hence, the natural, foreseeable, and inevitable result of the AISD's student assignment policy has been segregated schools throughout most of the city. Moreover, as we found in *Austin I,* "[a]ffirmative action to the contrary would have resulted in desegregation". 467 F.2d at 863. The inference is inescapable: the AISD has intended, by its continued use of the neighborhood assignment policy, to maintain segregated schools in East and West Austin.[13]

[12]East Austin is bordered on the north by East Nineteenth Street and the airport, on the south by the Colorado River, on the west by Interstate Highway 35, and on the east by the AISD boundary line. We found in *Austin I* that 64 percent of the City's Mexican-Americans live in East Austin. A large portion of the remaining Mexican-Americans live in the area between East and West Austin.

[13]The same conclusion is inferable from other evidence as well. We held in *Austin I*

> that the AISD has, in its choice of school site locations, construction and renovation of schools, drawing of attendance zones, student assignment and transfer policies, and faculty and staff assignments, caused and perpetuated the segregation of Mexican-American students within the school system.

467 F.2d at 865-66. We also found that "[t]he natural and foreseeable consequence of these actions was segregation of Mexican-Americans". 467 F.2d at 863. The Supreme Court inferred segregative intent from the same kind of circumstantial evidence in *Keyes*. See 413 U.S. at 192, 93 S.Ct. at 2689, 37 L.Ed.2d at 553. The inference of segregative intent that the Supreme Court made regarding the Denver school authorities is equally applicable to their counterparts in Austin.

The plaintiffs have therefore established a prima facie case of *de jure* segregation of Mexican-Americans in all portions of the school district except the residentially integrated central city area.[14]

E. The AISD's Attempted Rebuttal of the Prima Facie Showing of Segregative Intent

The AISD offers numerous arguments to justify the acts that we criticized in *Austin I* as segregating Mexican-American students in the Austin school system. For the second time, we reject these arguments.

The AISD contends that Mexican-Americans were segregated before 1950 not because of their ethnic background but because they had language difficulties or were the children of migrant workers and needed special educational considerations. We answered this argument in *Austin I:*

> We are not convinced that, to meet the special educational needs of Mexican-American children, the

[14]The district court held that the AISD had, in the past, assigned black students for the purpose of promoting segregation. The plaintiffs argue that this finding of *de jure* segregation in a substantial portion of the Austin school district triggers the *Keyes* presumption of unlawful segregation in the remainder of the district. The AISD responds that this *Keyes* presumption is inapplicable to the case before us because "[t]he existence of a statutorily based black-white system has no probative value with respect to concentrations of Mexican-American students when the Mexican-American Students were classified and treated as white under the dual system". *See Higgins v. Bd. of Educ. of Grand Rapids,* 6 Cir. 1974, 508 F.2d 779, 789. We need not resolve this dispute about the *Keyes* presumption because, even without this presumption, we conclude that the AISD has taken actions intentionally calculated to segregate the Mexican-American students throughout the district.

> AISD had to keep these children in separate schools, isolate them in Mexican-American neighborhoods, or prevent them from sharing in the educational, social, and psychological benefits of an integrated education.

467 F.2d at 869. We concluded that the AISD intentionally acted to segregate Mexican-Americans in the pre-*Brown* years.[15]

[9] The AISD then argues that, even if the early special programs are viewed as intentional segregation, no causal relationship exists between them and the present Mexican-American concentrations in the schools. We rejected this argument in *Austin I* when we held that the post-1950 AISD actions perpetuated the pre-1950 segregation.[16] We now reaffirm our previous rejection of this AISD contention.

The AISD's primary argument with regard to its post-1950 actions is that, although the location of new schools and the drawing of attendance zones for those schools had "the inevitable and unavoidable result" of increasing the concentrations of Mexican-Americans in the East Austin schools, this segregation resulted from the preexisting residential patterns and not from segregative motives of the AISD. This Court recently rejected a similar argument in *Morales v. Shannon*, 5 Cir. 1975, 516 F.2d 411, 413, *cert. denied*, 1975, ____ U.S. ____, 96 S.Ct. 566, 46 L.Ed.2d 408, 44 U.S.L.W. 3358:

> the imposition of the neighborhood assignment system froze the Mexican-American students into the Robb and Anthon schools. There could have been no other result and this is strong evidence of segregatory intent.

See also United States v. Midland Independent School District, 5 Cir. 1975, 519 F.d 60, *cert. denied*, 1976, ____ U.S. ____, 96 S.Ct. 1106, 47 L.Ed.2d 314. *United States v. Jefferson County Board of Education*, 5 Cir. 1966, 372 F.2d 836, 876, 879-80, *aff'd en banc*, 1967, 380 F.2d 385, *cert. denied*, 1967, 389 U.S. 840, 88 S.Ct. 67, 19 L.Ed.2d 103.

In rejecting for a second time these contentions of the AISD, we reaffirm—hopefully for the last time—the words of *United States v. Midland Independent School District*, 519 F.2d at 64:

> the facts in the Austin and Corpus Christi cases, however, as in this case, show an overriding intent by the school boards in those districts to isolate, to segregate, Mexican-Americans and blacks.

[10-12] Finally, we think it important to draw attention to a basic misconception of the AISD, on which a great deal of its argument relies. This misconception goes to the heart of the responsibilities of school authorities to provide equal educational opportunities for the students in their districts. The AISD has argued that "[u]nder *Keyes*, the school district was prohibited from segregating Mexican-American students, but it was under no duty to take affirmative action to attempt to avoid Mexican-American concentrations in the schools which resulted from residen-

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[15] "[T]he AISD used dual-overlapping attendance zones, student assignment policies, and site selection to segregate Mexican-American students in the years prior to 1954.
467 F.2d at 867.

[16] "After the Supreme Court decision in Brown, the AISD nominally undertook to abolish the dual system based on separate schools for blacks and whites. But the board continued to perpetuate segregation of Mexican Americans.
467 F.2d at 867.

tial concentrations". At least in the Texas schools, where we have held that Mexican-American students are entitled to the same benefits of *Brown* as are blacks, school authorities may not constitutionally use a neighborhood assignment policy creating segregated schools in a district with ethnically segregated residential patterns. A segregated school system is the foreseeable and inevitable result of such an assignment policy. When this policy is used, we may infer that the school authorities have acted with segregative intent.

The segregation is *de jure* and unconstitutional because it is the result of school board action taken with the obvious (though not necessarily predominant) intent to create or maintain segregated schools. School authorities are then "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch". *Green v. County School Board of New Kent County, Virginia,* 1968, 391 U.S. 430, 437-38, 88 S.Ct. 1689, 1694, 20 L.Ed.2d 716, 723. As articulated in *Austin I,* the case before us presents not only the use of a neighborhood assignment policy in a residentially segregated school district, but also the taking of an extensive series of actions dating back to the early twentieth century that had the natural, foreseeable, and avoidable result of creating and maintaining an ethnically segregated school system. The AISD must convert this "still-functioning dual system to a unitary, non-[ethnic] system—lock, stock, and barrel". *United States v. Jefferson County Board of Education,* 372 F.2d at 878.

III. SEGREGATION OF BLACKS

The district court held that "the AISD . . . has engaged in discriminatory assignment of black students to promote segregation" and ordered the AISD to dismantle its dual school system and convert to an integrated, unitary school system. These holdings have not been challenged on appeal. They are affirmed.

IV. THE REMEDY

A. The "Desegregation Plan" Adopted by the District Court

1. *The Plan.* The district court adopted whole the Sixth Grade Center Plan submitted by the AISD. We begin our analysis of this plan by stating what the AISD did not attempt to accomplish through it. The AISD views the junior and senior high schools in Austin as totally desegregated and, therefore, its plan does not further integrate those schools. The AISD, as noted above, does not believe that it has the duty to desegregate the Mexican-Americans and, hence, its plan has only an incidental effect on these students. Finally, the AISD contends that complete desegregation of the elementary schools would require "massive crosstown busing" of 6-10 year olds, which it views as undesirable, and, therefore, its desegregation plan is limited to the sixth grade.

> As the AISD describes it,
> [t]he Sixth Grade Center Plan essentially establishes six elementary schools in different geographic parts of the School District as centers for all sixth-grade students in the School District. Those buildings

> which are not serving as elementary schools and would become the sixth-grade centers would be emptied of all students K through grade 5 so the building would be available for the Sixth Grade Center. Students in those schools would be assigned to the nearest available elementary school.

The plan would also set up sixth grades at two of the junior high schools in Austin. Of the six Sixth Grade Centers, two would have Anglo populations of over 80 percent; the sixth grade populations at the two junior high schools would be about 97 percent minority. The AISD estimates that the plan would require the busing of about 1900 students, and that about 62 percent of those students would be Anglo.

In an effort to provide equal educational opportunities for all of its students, the AISD has also approved the employment of two assistant superintendents, one to be Mexican-American and one to be black; established majority-to-minority transfer provisions for both black and Mexican-American students; begun to develop a bilingual educational program; made several changes in boundary lines assertedly to produce a better racial and ethnic composition in the city schools; and established an advisory committee to investigate and propose programs for minority students that may be used in Austin.

[13* 2. *The Plan's deficiences.* As we did in *Austin I*, we congratulate the AISD for some of the creative educational techniques it has proposed and adopted for equalizing educational opportunities of minority students in Austin. We cannot applaud, however, the channeling of the AISD's creative abilities into new methods of circumventing its "affirmative duty to take whatever steps might be necessary to convert to a unitary system in which

racial [and ethnic] discrimination would be eliminated root and branch". *Green v. County School Board of New Kent County, Virginia*, 1968, 391 U.S. 430, 437-38, 88 S.Ct. 1689, 1694, 20 L.Ed.2d 716, 723. The first elementary school "desegregation plan" that the AISD presented to the district court provided for meetings of students one week per month to participate in certain cultural activities. We reversed the district court's adoption of this plan, holding that "[p]art-time desegregation does not meet constitutional requirements".[17] 467 F.2d at 872. On remand, the district court adopted the AISD's new "desegregation plan", which leaves untouched the students in grades K-5 and 7-12. For reasons similar to those that underlay our rejection of the AISD's plan in *Austin I*, we again hold that the AISD-district court plan is constitutionally deficient. The constitutional duty of the school authorities is to establish a unitary *system*, not a unitary grade.

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[17] In *Tasby v. Estes*, 5 Cir. 1975, 517 F.2d 92, *cert. denied*, 1975, 423 U.S. 939, 96 S.Ct. 299, 46 L.Ed.2d 271, 44 U.S.L.W. 3264, we held another "part-time" desegregation plan constitutionally deficient. The unique feature of the plan submitted there by the Dallas Independent School District (DISD) and adopted by the district court was the requirement that there be a minimum of one hour a day of contact between the races through two-way oral and visual television communication between two or more schools. We held:

> The Supreme Court has made it clear that nothing less than the elimination of predominantly one-race schools is constitutionally required in the disestablishment of a dual school system based upon segregation of the races. For this reason, the district court's elementary school "television plan" must be rejected as a legitimate technique for the conversion of the DISD from a dual to a unitary educational system.

517 F.2d at 103.

[14, 15] The AISD offers two arguments in support of its failure to desegregate grades K to 5. Both are meritless.

First it cites the Supreme Court's holding that

> the district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation.

Davis v. Board of School Commissioners of Mobile County, 1971, 402 U.S. 33, 37, 91 S.Ct. 1289, 1292, 28 L.Ed.2d 577, 581. The only "practicality" it specifies is the vague, conclusory, and unsupported assertion that children under 10 years old should not be bused for the purpose of desegregation. But busing, a "normal and accepted tool of educational policy", cannot be rejected without an evidentiary showing that "the time or distance of travel is so great as to risk either the health of the children or significantly impinge on the educational process". *Swann v. Charlotte-Mecklenburg Board of Education*, 1971, 402 U.S. 1, 29, 30–31, 91 S.Ct. 1267, 1283, 28 L.Ed.2d 554, 575.

[16] The AISD's only other defense of the exclusion of kindergarten-to-fifth-grade students from its desegregation plan is that the black intervenors and the United States should be precluded from objecting to the Sixth Grade Center Plan because they submitted no plan of their own. The Mexican-American intervenors, however, did propose a desegregation plan, in which the black intervenors concurred. And, as to the United States, although we are disappointed by their noncompliance with the district judge's request that they submit a plan, we find no basis for denying them the right to criticize the plan submitted by the AISD.

The plan adopted by the district court also fails to comply with the mandate of *Austin I*. The eight concurring judges in that case held that

> [w]here a student assignment plan is found to be unconstitutional, as here, because of the existence of segregation which has been imposed by statute or by official act against blacks and an identifiable ethnic group (here the Mexican-American students), it is the duty of the school officials to forthwith formulate and implement such student assignment plan as will remedy the discrimination which has been found to exist.

467 F.2d at 884. We held in Parts II and III of this opinion that official discrimination against blacks and Mexican-Americans has infected almost the entire Austin school system. The discrimination has prevented most minority students in the district from securing educational opportunities equal to those of their Anglo counterparts. The AISD's submission of a "desegregation plan" that would provide an integrated education for only sixth grade students simply does not fulfill the AISD's duty to remedy that discrimination.

[17, 18] The plan submitted by the AISD would assign students in grades K to 5 to the schools closest to their homes. The district court's adoption of this plan is directly contrary to the holding in *Austin I* that

> [it] is apparent that [assignment on a strict neighborhood basis] will not suffice in the AISD although it may suffice as to some schools. To the extent that it does not suffice, the district court will proceed to employ other methods of desegregation.

The *Austin I* majority also held that if, after trying the pairing or clustering of schools, the realignment of school

assignment zones, and the relocation of portable school rooms, "proscribed segregated schools still exist, the court must consider the pairing or clustering of schools in non-contiguous school zones". 467 F.2d at 885. It was an abuse of discretion for the court to refuse to give serious consideration to the last desegregation method despite the concession of the AISD that

> [c]ountless efforts by school officials, consultants, and visiting team shave found it impossible to produce significant desegregation by boundary line changes, contiguous pairing of schools, magnet schools, or other effective means short of massive crosstown busing incident to non-contiguous pairing of . . . schools . . . .[18]

[19] 3. *The closing of Anderson High School and Kealing Junior High School.* In his first opinion in this case, the district judge ordered the closing of two all-black schools, Anderson and Kealing.[19] The students from those

[18]The federal courts may adopt desegregation remedies requiring busing only as a last resort. *See* 20 U.S.C. §§ 1713, 1755. In the case before us, however, we find that crosstown busing is the only desegregation method that will work. This finding is supported not only by the above-quoted statement of the AISD but also by the residential patterns in Austin. In school districts with segregated neighborhoods, "[d]esegregation plans cannot be limited to the walk-in school". *Swann v. Charlotte-Mecklenburg Bd. of Educ.* 1971, 402 U.S. 1, 30, 91 S.Ct. 1267, 1283, 28 L.Ed.2d 554, 575. Hence the federal statutes do not bar the court-ordered transportation of students in Austin.

[19]At the time Anderson High School was closed, it was 98 percent black and its student body constituted about 44 percent of the black high school population in the Austin school district. Kealing Junior High School was also 98 percent black and its student body constituted 46 percent of the black junior high school students in the district. *See Austin I*, 467 F.2d at 876-77, Appendix A.

schools were to be transferred to other schools in the system. Six judges concluded in *Austin I* that the schools were closed for racial reasons and, hence, the closings were unacceptable. 467 F.2d at 872. The remaining eight judges did not consider this issue. On remand, the district court found that the school closings were based on nonracial considerations. This finding is clearly erroneous. The AISD concedes, as it must, that a primary reason for the school closings was the fear that whites would flee the school system rather than send their children to these East Austin schools. It is hardly a new principle of constitutional law that this fear is an impermissible basis for closing public schools. *See, e.g., United States v. Hendry County School District,* 5 Cir. 1974, 504 F.2d 550, 553.

Kealing Junior High School must therefore be reopened and used as part of the regular public school program of the District. The district court approved the conversion of Anderson High School into Austin Community College, and the conversion has already taken place. Because it has closed Anderson as a high school, the AISD on remand should present a program that will permit the burdens of desegregation to be as fairly distributed as they would have been if Anderson had not been converted into a community college.[20]

B. The Finger Plan

1. *The Plan.* The Mexican-American intervenors submitted a desegregation plan prepared by Dr. John A. Finger, Jr., a professor of education at Rhode Island Col-

[20]For example, through the construction of a new high school in East Austin.

lege.[21] The "Finger Plan" would convert the school system to a 4-4-4 grade structure, that is, elementary schools would contain grades K to 4, middle schools would contain grades 5 to 8, and high schools would continue to operate grades 9 to 12. All students in grades K to 4 in elementary schools that are over 50 percent minority would be bused to elementary schools that are over 90 percent Anglo. Fifth-to-eighth-grade students in schools that are over 90 percent Anglo would be bused to schools that are over 50 percent minority. The practical effect of the Plan is that kindergarten-to-fourth-grade students in East Austin would be bused to West Austin and fifth-to-eighth-grade students in West Austin would be bused to East Austin. Elementary and junior high schools that are between 50 and 90 percent Anglo are defined as "naturally desegregated" and would remain unchanged. When changing demographic patterns cause any of these schools to fall outside of the "naturally desegregated" range, the schools would be brought within the Finger Plan 4-4-4 system. The high schools would be integrated by selecting, for each high school, feeder schools that would maximize the integration of that high school. Dr. Finger estimates that 18,659 (the AISD says 25,000) of Austin's public school students would be bused under his plan.[22]

[21]Dr. Finger is a recognized authority in the area of school desegregation and has designed the plans presently being used in several cities. He prepared, for example, the plan for Charlotte, North Carolina, which was approved by the Supreme Court in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 1971, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554.

[22]The Finger Plan would therefore require the busing of about 32 percent (42 percent according to the AISD's estimate) of the Austin students. This is comparable to the Charlotte-Mecklenburg, North Carolina school system, which, before the Supreme Court's 1971 desegregation order, planned to bus 27 percent of its students "without regard to desegregation plans", and the Mobile County, Alabama school system, which bused 30 percent of its students before the Supreme Court's 1971 desegregation order. *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 1971, 402 U.S. 1, 6, 29 n. 11, 91 S.Ct. 1267, 1271, 28 L.Ed.2d 554, 561; *Davis v. Board of School Commissioners of Mobile County*, 1971, 402 U.S. 33, 34, 91 S.Ct. 1289, 1290, 28 L.Ed.2d 577, 579. Moreover, the Supreme Court noted in *Swann* that about 39 percent of this country's public school children were bused to their schools in 1969–70. 402 U.S. at 29, 91 S.Ct. at 1282, 28 L.Ed.2d at 574.

[20] 2. *The AISD's objections to the Finger Plan.* The AISD's first objection to the Finger Plan is that it is counter-productive in that it requires kindergarten-to-fourth-grade Anglo students attending schools in minority areas to be bused along with minority students to schools in Anglo areas; it also requires fifth-to-eighth-grade minority students going to predominantly Anglo schools to be bused along with their Anglo classmates to minority areas. These results are dictated by the feature of the Finger Plan that requires *all* students in the relevant grades at "sending schools" to be bused to the designated "receiving schools". About 357 Anglos presently attending minority schools and about 168 minority students presently attending Anglo schools will be bused to the new schools.[23] These students represent only about 1 percent of

[23]The AISD has calculated that the correct figures are 535 Anglos and 336 minority students. These numbers are too high because the AISD has assumed that *all* students at elementary and junior high schools over 50 percent minority or 90 percent Anglo would be bused to new elementary or middle schools outside of their neighborhoods. The Finger Plan, however, would bus only kindergarten-to-fourth-grade students from the elementary schools in East Austin and fifth-to-eighth-grade students from the elementary and junior high schools

the pre-high school students in Austin. These percentages are simply not substantial enough to invalidate the entire desegregation plan. If, on remand, the district court concludes that a constitutionally sufficient degree of desegregation can be achieved without busing these 525 students across town, the Finger Plan may be so modified.

The AISD also criticizes the Finger Plan because the newly created elementary and middle schools would be (by the AISD's estimate) about 54 percent minority, although the entire Austin pre-high school system is only about 40 percent minority. This discrepancy is due to the fact that the "naturally desegregated" schools left untouched by the Finger Plan are substantially more than 60 percent Anglo. Thus, Dr. Finger would permit a disproportionately large number of Anglo students to remain at their present schools.

[21] The Supreme Court has held that "[t]he constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole". *Swann*, 402 U.S. at 24, 91 .Ct. at 1280, 28 L.Ed.2d at 571. But the Court later held in the same opinion that "[t]he district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation . . . ." 402 U.S. at 26, 91S.Ct. at 1281, 28 L.Ed.2d at 572. Such an effort must be made by the district court on remand.[24]

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in West Austin. Hence, the AISD estimates are about one-third too high for the Anglo students at minority schools in East Austin and about one-half too high for the minority students at Anglo schools in West Austin.

[24]Quotas may be a starting point for the district court, but are not an ironclad requirement. *See Milliken v. Bradley*. 1974, 418 U.S. 717,

[22] The AISD also argues that the 4-4-4 school system, though perhaps logical for the purpose of facilitating school desegregation, is basically inconsistent with sound educational principles. This argument is based solely on the testimony of Dr. Jack Davidson, the Superintendent of Schools for the AISD, that placing fifth graders in the same schools (the middle schools) with students four years older "at that period of time—it is the developmental age—produces all kinds of problems". Even if that statement is considered persuasive, these "problems" can be solved when a final plan is constructed on remand. Dr. Finger testified that his plan could, and perhaps should, be modified to a 5-3-4 system. This plan would replace the middle schools with junior high schools housing the sixth, seventh, and eighth grades.

[23] The AISD next brings to our attention several problems that would be created by the Finger Plan busing program. It first argues that the Plan would require the busing of students "in a basic east-west pattern through a traffic system which provides no adequate east-west arteries". Moreover, the AISD continues, the students would have to be bused through the large complex of the downtown business area, the state office buildings, and the University of Texas, and this would produce a highly congested traffic situation. The AISD also cites the eco-

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740-41, 94 S.Ct. 3112, 3125, 41 L.Ed.2d 1069, 1088-89; *North Carolina Bd. of Educ. v. Swann*, 1971, 402 U.S. 43, 46, 91 S.Ct. 1284, 1286, 28 L.Ed.2d 586, 589.

nomic cost of the busing, the difficulty of obtaining sufficient fuel, and the inevitability of "white flight", which would render the Plan ineffective as a desegregation device.[25]

[24] We think it is important to point out first the reason these remedial costs are relevant to judicial decisionmaking in a school desegregation case. We point this out because the AISD seems to be arguing that these costs are relevant to the determination whether there is a constitutional violation, that is, that the court must decide that the harmfulness of the school segregation is sufficient to justify the remedial costs of correcting that segregation. *See generally* Fiss, The Jurisprudence of Busing, 39 Law & Contemp.Prob. 194 (1975). We disagree.

[25]The AISD contends that whites will flee the Austin public school system to attend private schools and public schools in surrounding school districts. As a result, the AISD concludes that the plan fails to meet the standard of *Davis v. Board of School Commissioners of Mobile County*, 1971, 402 U.S. 33, 37, 91 S.Ct. 1289, 1292, 28 L.Ed.2d 577, 581: "The measure of any desegregation plan is its effectiveness." The district court was presented with two desegregation plans, the AISD Plan, which would desegregate only the sixth grade, and the Finger Plan, which would desegregate the entire school system. It is wholly speculative whether white flight will eventually render the Finger Plan less effective than the AISD Plan in transforming the AISD into a unitary system. It is beyond dispute, however, that the Finger Plan is the more effective desegregation device for the immediate future. For this reason, and others that we have specified in this opinion, it was an abuse of discretion for the district court to adopt the AISD Plan. *See United States v. Bd. of School Commissioners of Indianapolis, Indiana*, 7 Cir. 1974, 503 F.2d 68, 75-76, *cert. denied*, 1973, 413 U.S. 920, 93 S.Ct. 3066, 37 L.Ed.2d 1041.

The Supreme Court stated the controlling principle in *Swann*, 402 U.S. at 15-16, 91 S.Ct. at 1276, 28 L.Ed.2d at 566:

> a school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right. The task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution.

In other words, there are two separate phases to a school desegregation case. First, the Court must determine whether there is *de jure* segregation. This decision, in cases such as the one before us, conforms with the standards of *Keyes*. Second, the Court must decide upon a remedy. It is at this point that the balancing of interests becomes relevant.[26] In this phase of the case, the Court must determine

[26]The Court stated in *Brown II* that, in determining whether school authorities should be given additional time to carry out the desegregation remedy, "the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel . . . ." 349 U.S. 294 at 300, 75 S.Ct. 753, 99 L.Ed. 1083. The *Brown II* Court, however, carefully limited its approval of consideration of these problems to the delay issue. *See also Watson v. Memphis*, 1963, 373 U.S. 526, 532-33, 83 S.Ct. 1314, 1318, 10 L.Ed.2d 529, 534-35.

The AISD's arguments that its school district should not be ordered to desegregate "root and branch" because of economic cost and the specter of white flight have already been rejected by the Supreme Court. In *Watson*, 373 U.S. at 537-38, 83 S.Ct. at 1320-21, 10 L.Ed.2d 537-38, the Court was unpersuaded by the argument that desegregation of the Memphis parks should be delayed because of the expenses it would generate:

the least costly method of correcting the constitutional violation.[27] But the above quote from *Swann* leaves no doubt that, however, the balancing of interests is resolved, the constitutional violation must be corrected.

[25] We therefore direct the district court, in completing the desegregation plan for Austin, to minimize the economic cost of busing, the traffic congestion that the busing plan will cause, the time that school children must spend on the buses, and the number of students who will leave the public school system rather than participate in the desegregation plan.[28] The overriding judicial goal,

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it is obvious that vindication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny them to afford them. We will not assume that the citizens of Memphis accept the questionable premise implicit in this argument or that either the resources of the city are inadequate, or its government unresponsive, to the needs of all of its citizens.

And the Court has repeatedly held that segregative state action must be terminated and remedied despite public disagreement with the constitutional principles. *See, e. g., United States v. Scotland Neck City Bd. of Educ.*, 1971, 407 U.S. 484, 490-91, 92 S.Ct. 2214, 2217-18, 33 L.Ed.2d 75, 80-81; *Watson*, 373 U.S. at 535, 83 S.Ct. at 1319, 10 L.Ed.2d at 536; *Cooper v. Aaron*, 1958, 358 U.S. 1, 16, 78 S.Ct. 1401, 1408, 3 L.Ed.2d 5, 15: *Brown II*, 349 U.S. at 300, 75 S.Ct. at 756, 99 L.Ed. at 1106; *Buchanan v. Waley*, 1917, 245 U.S. 60, 81, 38 S.Ct. 16, 20, 62 L.Ed. 149, 163.

[27]*See* Fiss, 39 Law & Contemp.Prob. at 198. Professor Fiss correctly points out that "[t]he court need not choose the remedy that has the best cost-benefit relationship since it may eliminate a smaller portion of the harm". Id.

[28]On the issue of "white flight", the district court should accord appropriate weight to the following testimony of Dr. Finger:

[M]y thought in preparing this plan was to minimize the public anguish over busing as much as possible, that there isn't any way that one can overcome it, but my attempt was to minimize it as much as possible.

however, must be "the development of a decree 'that promises realistically to work, and promises realistically to work now.'". *Davis v. Board of School Commissioners of Mobile County*, 402 U.S. at 38, 91 S.Ct. at 1292, 28 L.Ed.2d at 581, *quoting Green v. County School Board of New Kent County, Virginia*, 1968, 391 U.S. 430, 439, 88 S.Ct. 1689, 1694, 20 L.Ed.2d 716, 724.

C. Formulation of the Desegregation Decree

[26] We affirm the district court order that the AISD continue in its active efforts to recruit Mexican-American teachers. The AISD should work "toward the achievement, as a goal, of a ratio of mexican-american teachers to total faculty that approaches the ratio of mexican-american students to the total student population". *Cisneros*, 467 F.2d at 151-52. Moreover, the ratio of Mexican-American to Anglo teachers in each school should be substantially the same as it is throughout the district. *See United States v. Montgomery County Board of Education*, 1969, 395 U.S. 225, 89 S.Ct. 1670, 23 L.Ed.2d 263. We have already held that the AISD has adequately desegregated its faculty on a black-white basis. *Austin I*, 467 F.2d at 870 n. 37.

[27] The AISD had an ongoing bilingual-bicultural education program that the Superintendent of Schools testified would continue "regardless of the level of federal funding". Indeed, state and federal law require as much. *See* 20 U.S.C. § 1703(f); Tex.Educ.Code Ann. § 21.451 et seq. (1975 pocket part). *See also Lau v. Nichols*, 1974, 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1. The district court properly made this commitment a part of its decree.

[28] We held in *United States v. Board of Public Instruction of Polk County, Florida,* 5 Cir. 1968, 395 F.2d 66, 69, that

> [t]here is an affirmative duty, overriding all other considerations with respect to the locating of new schools, except where inconsistent with "proper operation of the school system as a whole" to *seek* means to eradicate the vestiges of the dual system.

See also Swann, 402 U.S. at 20–21, 91 S.Ct. at 1278, 28 L.Ed.2d at 569; *Tasby v. Estes,* 5 Cir. 1975, 517 F.2d 92, 104–06, *cert. denied,* 1975, 423 U.S. 939, 96 S.Ct. 299, 46 L.Ed.2d 271. The district court was therefore correct in incorporating into its order the commitment of the AISD to locate newly constructed schools in such a manner as to maximize integration. When formulating the Austin desegregation decree on remand, the district court should approve new school sites only if they would operate, within the context of the new desegregation decree, to maximize integration in the district.

[29] We suggest that the district court consider appointing a master to draft a comprehensive tri-ethnic desegregation plan consistent with this opinion and the decisions of the United States Supreme Court.[29] The plan should conform to one of the approaches outlined by Dr. Finger in his written submission of August 14, 1972, and in his testimony.

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[29]The AISD should provide staff assistance to the master or expert upon his request. *See, e. g., United States v. Bd. of School Commissioners of Indianapolis, Indiana,* 7 Cir. 1974, 503 F.2d 68, 78, *cert. denied,* 1973, 413 U.S. 920, 93 S.Ct. 3066, 37 L.Ed.2d 1041; *Bradley v. Milliken,* 6 Cir. 1973, 484 F.2d 215, 252, *rev'd on other grounds, 1974, 418 U.S. 717, 94 S.Ct. 3112, 41 L.Ed.2d 1069.*

V. CONCLUSION

[30] Finally, the intervenors are entitled to reasonable attorneys' fees. *See* § 718 of Title VII of the Emergency School Aid Act of 1972, 20 U.S.C. § 1617; *Bradley v. School Board of Richmond,* 1974, 416 U.S. 696, 94 S.Ct. 2006, 40 L.Ed.2d 476; *Henry v. Clarksdale Municipal Separate School District,* 5 Cir. 1973, 480 F.2d at 583. The district court should conduct evidentiary proceedings to determine the proper amount of fees to be awarded.

We have today held, for the second time, that a desegregation plan submitted by the AISD is constitutionally insufficient. Blacks and Mexican-Americans in Austin have waited a long time for the unitary school system that the constitution requires. We suggest that the district court move expeditiously on remand to provide Austin minority students with such a system.

We reverse the judgment of the district court and remand the case for further proceedings consistent with this opinion. The mandate of the Court shall issue forthwith. The district court should consider appointing a master to prepare a comprehensive desegregation plan. The desegregation plan adopted by the district court in 1973 may be continued only as a stop-gap.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

APPENDIX
AUSTIN INDEPENDENT SCHOOL DISTRICT
ETHNIC COMPOSITION OF STUDENTS*
1975-76

School	*Total*	*Black*	*Mexican-American*	*Anglo*
SENIOR HIGH SCHOOLS				
Anderson	2432	219	57	2156
		(9)	(2)	(89)
Austin	1842	210	502	1130
		(12)	(27)	(61)
Crockett	3095	239	299	2557
		(8)	(10)	(82)
L. B. Johnson	1656	388	127	1141
		(23)	(8)	(69)
Johnston	1441	423	1003	15
		(29)	(70)	(1)
Lanier	2285	291	151	1843
		(13)	(6)	(81)
McCallum	1407	94	203	1110
		(7)	(14)	(79)
Reagan	1688	502	171	1015
		(30)	(10)	(60)
Travis	1900	154	803	943
		(8)	(42)	(50)
SENIOR HIGH SCHOOLS TOTALS	17,746	2520	3316	11,910
		(14)	(19)	(67)

Derived from October 10, 1975 submission of the AISD. Figures in parentheses indicate percentages.

School	*Total*	*Black*	*Mexican-American*	*Anglo*
JUNIOR HIGH SCHOOLS				
Allan	836	268	575	20
		(31)	(67)	(2)
Bedichek	1168	75	181	912
		(6)	(16)	(78)
Burnet	1029	139	70	820
		(13)	(7)	(80)
Dobie	1110	206	118	786
		(18)	(11)	(71)
Fulmore	921	83	431	407
		(9)	(47)	(44)
Lamar	750	50	133	567
		(7)	(18)	(75)
Martin	957	74	851	32
		(8)	(89)	(3)
Murchison	873	109	18	746
		(13)	(2)	(85)
O. Henry	694	57	80	557
		(8)	(12)	(80)
Pearce	1308	435	104	769
		(33)	(8)	(59)
Porter	934	105	147	682
		(11)	(16)	(73)
JUNIOR HIGH SCHOOLS TOTALS	10,607	1601	2708	6298
		(15)	(26)	(59)

School	Total	Black	Mexican-American	Anglo
ELEMENTARY SCHOOLS				
Allison	714	106	580	28
		(15)	(81)	(4)
Andrews	515	129	36	350
		(25)	(7)	(68)
Baker	489	47	102	340
		(10)	(21)	(69)
Barrington	654	13	80	561
		(2)	(12)	(86)
Barton Hills	317	4	11	302
		(1)	(4)	(95)
Becker	711	68	521	122
		(10)	(73)	(17)
Blackshear	450	436	14	—
		(97)	(3)	
Blanton	616	207	63	346
		(34)	(10)	(56)
Brentwood	547	22	99	426
		(4)	(18)	(78)
Brooke	389	3	377	9
		(1)	(97)	(2)
Brown	548	119	151	278
		(22)	(27)	(51)
Bryker Woods	244	2	20	222
		(1)	(8)	(91)
Campbell	468	460	6	2
		(98)	(1)	(1)
Casis	591	20	32	539
		(3)	(6)	(91)
Cook	668	26	85	557
		(4)	(13)	(83)
Cunningham	806	10	90	706
		(1)	(11)	(88)

School	Total	Black	Mexican-American	Anglo
Dawson	693	41	442	210
		(6)	(64)	(30)
Dill	114	3	7	104
		(3)	(6)	(91)
Doss	626	10	7	609
		(2)	(1)	(97)
Govalle	698	167	501	30
		(24)	(72)	(4)
Graham	400	11	29	360
		(3)	(7)	(90)
Gullett	481	—	7	474
			(1)	(99)
Harris	590	120	72	398
		(20)	(12)	(68)
Highland Park	408	4	13	391
		(1)	(3)	(96)
Hill	551	5	6	540
		(1)	(1)	(98)
Joslin	947	94	130	723
		(10)	(14)	(76)
Lee	260	36	47	177
		(14)	(18)	(68)
Linder	624	47	99	478
		(7)	(16)	(77)
Maplewood	353	280	40	33
		(79)	(11)	(10)
Mathews	257	31	69	157
		(12)	(27)	(61)
Menchaca	381	12	42	327
		(3)	(11)	(86)
Metz	495	4	487	4
		(1)	(98)	(1)
Norman	316	309	7	—
		(98)	(2)	

School	*Total*	*Black*	*Mexican-American*	*Anglo*
Oak Hill	582	3	18	561
		(1)	(3)	(96)
Oak Springs	321	303	18	—
		(94)	(6)	
Odom	1032	25	240	767
		(3)	(23)	(74)
Ortega	399	243	145	11
		(61)	(36)	(3)
Palm	419	—	394	25
			(94)	(6)
Pease	254	47	53	154
		(18)	(21)	(61)
Pecan Springs	537	205	53	279
		(38)	(10)	(52)
Pillow	538	8	30	500
		(1)	(6)	(93)
Pleasant Hill	821	22	172	627
		(3)	(21)	(76)
Read	681	70	37	574
		(10)	(6)	(84)
Reilly	278	4	78	196
		(1)	(28)	(71)
Ridgetop	228	2	111	115
		(1)	(49)	(50)
Rosedale	266	7	52	207
		(3)	(19)	(78)
Rosewood	160	156	4	—
		(98)	(2)	
St. Elmo	975	32	321	622
		(3)	(33)	(64)
Sims	494	455	34	5
		(92)	(7)	(1)
Summitt	201	—	1	200
				(100)

School	*Total*	*Black*	*Mexican-American*	*Anglo*
Sunset Valley	611	20	61	530
		(3)	(10)	(87)
Travis Heights	762	93	301	368
		(12)	(40)	(48)
Walnut Creek	308	3	42	263
		(1)	(14)	(85)
Webb	897	169	122	606
		(19)	(14)	(67)
Winn	544	180	34	330
		(33)	(6)	(61)
Wooldridge	747	32	80	635
		(4)	(11)	(85)
Wooten	635	18	85	532
		(3)	(13)	(84)
Zavala	415	23	384	8
		(6)	(92)	(2)
Zilker	541	23	100	418
		(4)	(19)	(77)
ELEMENTARY SCHOOLS TOTALS	30,567	4989	7242	18,336
		(16)	(24)	(60)
GRAND TOTAL	58,920	9110	13,266	36,544
		(15)	(23)	(62)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA	( )	
	( )	
	( )	**Civil**
	( )	**Action**
VS.	( )	**No. A-**
	( )	**70-CA-80**
	( )	
TEXAS EDUCATION AGENCY, ET AL.	( )	
(Austin Independent School Dist.)	( )	

MEMORANDUM OPINION AND ORDER

This school desegregation suit is before this Court on remand from the Fifth Circuit Court of Appeals, 467 F.2d 848 (1972). The suit was originally brought by the United States Department of Justice to challenge alleged segregation of black and Mexican-American students in the Austin Independent School District (AISD). On July 19, 1971, this Court approved, with modifications, a school desegregation plan proposed by the AISD. On appeal, the Circuit Court, aware of the equivocation by the Department of Justice, permitted intervention by interested black and Mexican-American citizens of Austin. The Justice Department's equivocation has been manifested by an unwillingness, continuing to this day, to submit a plan which it would consider appropriate to remedy the segregation it

alleges to exist in the AISD. This Court is now once again in the position of being compelled to pass upon the adequacy of a student assignment plan submitted by the AISD. The Court having heard all evidence, testimony, stipulations and argument presented by the parties, now sets forth its Findings of Fact and Conclusions of Law in this Memorandum Opinion and Order.

I. DISCRIMINATION AS TO BLACKS

Prior to Brown v. Board of Education, 347 U.S. 483 (1954) the AISD was required by State law to segregate black and white students. Shortly after the Supreme Court's declaration that the operation of such a dual school system contravened the Constitution, the AISD began a voluntary program of desegregation until by 1963, enforced segregation was completely removed from the school system. While the District's efforts during that time undoubtedly fell short of the subsequently-proclaimed "affirmative duty to take whatever steps might be necessary to convert to a unitary system in which discrimination would be eliminated root and branch," Green v. County School Board of New Kent County, 391 U.S. 430, 437-38 (1968), its voluntary actions during a time when many Southern communities were violently rejecting any desegregation whatsoever reflects a desire to comply with the law and to eschew discriminatory segregation.

Nonetheless, the fact is clear that the AISD, at some time in the past, has engaged in discriminatory assignment of black students to promote segregation. As the Supreme Court has said, "If the actions of school authorities were

to any degree motivated by segregative intent and the segregation resulting from those actions continues to exist, the fact of remoteness in time certainly does not make those actions any less 'intentional'." Keyes v. School District No. 1, _____U.S._____, 41 U.S.L.W. 5002, 5008 (June 19, 1973). Consequently, the AISD must now show that it has dismantled its old dual school system, and converted to an integrated unitary school system.

II. DISCRIMINATION AS TO MEXICAN-AMERICANS

Indisputably, some eight elementary, two junior high, and one senior high schools in Austin educate disproportionately large numbers of Mexican-American students. The Fourteenth Amendment, of course, prohibits segregation in public schools if it results from state action. As the Fifth Circuit has noted, two distinct factual determinations are required to support a finding of unlawful segregation: "First, a denial of equal educational opportunity . . ., defined as racial or ethnic segregation. Secondly, this segregation must be the result of state action." Cisneros v. Corpus Christi Independent School District, 467 F.2d 142, 148 (5th Cir. 1972).

Inasmuch as the AISD has, in the past, maintained a dual school system insofar as black students are concerned, we must first determine whether this policy was "separate, identifiable and unrelated," Keyes, supra at 5009, to the District's treatment of Mexican-American students. Clearly it was. The AISD's old statutorily required dual school system was based upon discrimination

between whites and blacks. Mexican-American students are, and always have been, classified as "white" by the AISD. The historic legal treatment of black and Mexican-American students has been completely different. Moreover, the treatment of Mexican-American students was wholly unrelated to maintenance of the black-white dual school system.

The School District having demonstrated that the black-white dual system did not create a dual school system insofar as Mexican-American's were concerned, we must consider whether the AISD has rebutted ". . . petitioners' prima facie case of intentional segregation [of Mexican-American's] . . . raised by the finding of intentional segregati[on] [of blacks] . . ." Keyes, supra at 5009.

> There, the Board's burden is to show that its policies and practices with respect to school site locations, school size, school renovations and additions, student attendance zones, student assignment and transfer options, mobile classroom units, transportation of students, assignment of faculty and staff, etc., considered together and premised on the Board's so-called "neighborhood school" concept, either were not taken in effectuation of a policy to create or maintain segregation [of Mexican-American's] . . ., or, if unsuccessful in that effort, were not factors in causing the existing condition of segregation in these schools.

Id.

We begin by observing that there has never been any statute, rule, regulation, or policy of the AISD which prohibited Mexican-American students from attending school

with Anglo students. Mexican-American and Anglo students have attended schools and classes together at virtually all times during the operation of the AISD. Notwithstanding this uncontroverted fact, we must determine whether the AISD has ever exhibited a purpose or intent to promote segregation of Mexican-American students. "We emphasize that the differentiating factor between *de jure* segregation and so-called *de facto* segregation to which we referred in Swann [v. Charlotte-Mecklenburg, 402 U.S. 1 (1971).] is *purpose* or *intent* to segregate." Keyes, supra at 5007

Perhaps the strongest showing of an allegedly segregative intent toward Mexican-American's is in the creation of the West Avenue, Comal Street and Zavala schools. West Avenue served grades 1-3 from 1916 until 1947. Comal Street was closed in 1936. Zavala operated as a special school from 1936 until 1954, when it was given an attendance zone similar to any other school. These schools were designed to serve the educational needs of non-English speaking students, and students who were members of migrant farm-working families and who could not, consequently, attend school for a full normal school year. In this day of educational innovation, the Court notes that many of the teaching methods used in these schools may now be considered outdated and inadequate. Nonetheless, the Court is of the strong opinion that the existence of these schools represented no more than a humane and compassionate attempt by the School District, using the educational techniques then accepted as proper and progressive, to meet the special educational needs of children who would otherwise have been much more severely handicapped in their efforts to obtain an education. More-

over, Mexican-American students were not required to attend these special schools. On the contrary, substantial numbers of Mexican-American students attended other predominantly Anglo schools throughout the District during this time. The Court finds that these three schools, all of which were open schools with no attendance zones while operating as special schools, had no effect on the racial or ethnic housing patterns in the District.

Of the seven predominantly Mexican-American elementary schools in the District other than Zavala, five (Becker, Palm, Metz, Dawson and Govalle) opened as predominantly Anglo schools. These five schools gradually became predominantly Mexican-American because of shifting residential patterns, and their transformation was in no way caused by any action of the AISD. The District has clearly shown the lack of a segregatory intent or purpose regarding these schools.

The other five predominantly Mexican-American schools in the District (Allison and Brooke Elementary, Martin and Allan Jr. High, and Johnston High Schools) did open with a predominance of Mexican-American students. The record reflects however, that these schools were, without exception, located as they were solely because of growth in the East Austin area and the need for new schools to serve the area. The area of heaviest black and Mexican-American concentration in the District, referred to herein as East Austin, is a relatively isolated area. It is bounded on the south by the Colorado River, across which access is inadequate. To the west of the area are a major interstate highway, the University of Texas, and the State Capitol complex. Barricading the north end of the area is the Austin Municipal Airport. On the eastern edge

of the area is the AISD boundary. Thus, schools built to serve growth in East Austin could necessarily serve *only* that area unless the historically-honored "neighborhood school" concept were completely abandoned. The location of schools within this area had little immediate impact, and virtually no long-term impact, upon the integration of Anglo and Mexican-American students.

After a thorough review of the evidence the Court finds that the AISD has successfully demonstrated that its policies with regard to school site location, school size, school renovations and additions, student attendance zones, student assignment and transfer options, mobile classroom units, transportation of students, assignment of faculty and staff, etc., were not effectuated as part of a policy of promoting segregation of Mexican-American's. Rather, the Court finds that the AISD has demonstrated an absence of segregatory intent or purpose toward Mexican-American's. Consequently, a decree by this Court for "all-out desegregation" of Mexican-American's would be improper. Keyes, supra at 5009.

Our obligation to assure to the Mexican-American intervenors in this case the equal protection of the laws does not end with our finding that such segregation of Mexican-American's as does exist in Austin is not the result of a segregatory intent or purpose on the part of the AISD. Mexican-American's in Austin constitute an identifiable ethnic minority, recognizable by their numbers, concentration, cultural uniqueness, and common special needs and problems. We find that Mexican-American students in Austin constitute "an identifiable, ethnic-minority class entitled to the equal protection guarantee of the Fourteenth Amendment." Cisneros, supra at 149. As such,

Mexican-American students are entitled to proper implementation of steps necessary to assure them the equal protection of the laws and an equal educational opportunity, including implementation of a curriculum and special educational programs, such as bilingual-bicultural education, necessary to provide equal educational opportunities for Mexican-American students as a group.

III. THE REMEDY

The AISD has submitted a compilation of its record in converting to a unitary school system and fulfilling its obligation to implement a curriculum and special educational programs necessary to provide equal educational opportunities for black and Mexican-American students. Additionally, it has submitted a "Sixth Grade Center Plan" and an alternative "Fifth and Sixth Grade Center Plan" by which the mixing of black and white students will be promoted.

Austin junior and senior high school students are fully desegregated. The closing of the old Anderson High School and Kealing Junior High School has been challenged by the black Intervenors. Testimony indicated, however, that the old Anderson (the Anderson name has been retained and transferred to the new high school due to open for the 1973-74 school year, serving the predominantly Anglo northwest area of Austin; this action will make Austin one of the comparatively few cities in Texas to have a predominantly Anglo high school named in honor of a black person) facility was inadequate to continue as a high school. One option would have been to

convert it to a junior high school. The AISD has now, however, designated the facility as a location for the newly-created community college in Austin. As such, the facility will draw students from throughout the District. We find this use of the facility to be fully as acceptable as any other possible use. Testimony further indicated that only a part of the Kealing facility would be acceptable for continued use. Rather than operate on this basis, the District determined that the facility should be closed and its students re-assigned. We find no impermissible closing of schools solely for racial reasons. Cf. Lee v. Macon County Board of Education, 448 F.2d 746 (5th Cir. 1971). Moreover, the impact of the closing of these facilities will be greatly alleviated with the opening of the new Lyndon B. Johnson (Northeast) High School in 1974, and the projected construction of a new Northeast Junior High School. These facilities will be placed in racially neutral locations, drawing naturally desegregated student bodies.

The desegregation of elementary schools presents the greatest problem in this case. Elementary zones have traditionally been small in Austin, and the facilities, drawing students only from their immediate neighborhoods, have been correspondingly small. As we have previously discussed, East Austin is a locked-in, relatively inaccessible part of Austin. The only portion of Austin readily accessible from East Austin is Northeast Austin. The schools in Northeast Austin are, however, already largely integrated, and any attempt to use this area alone as the AISD's desegregative tool would be inequitable, would upset natural patterns of integration, and would very likely result ultimately in total resegregation.

Additionally, the predominantly Mexican-American Southeast Austin area could be used to desegregate black

schools. This would, however, be intolerable. As this Court has stated, "All too often, the practical effect of the 'desegregation' of school systems has been that black students are mixed with Mexican-American students, thus denying to both groups the benefit of any meaningful desegregation. Schools with substantial Mexican-American populations cannot be made to carry a disproportionate share of the burden of desegregation." Arvizu v. Waco Independent School District, at 8, Civil Action No. W-71-CA-56 (W.D. Tex. April 27, 1973).

Clearly, the entire community must be involved in any effort to desegregate the black East Austin elementary schools. The Sixth Grade Center Plan submitted by the AISD does involve the entire community in the desegregation of at least one grade of the elementary school years. Involvement of the entire community in desegregation of additional grades (even the District's Fifth and Sixth Grade Center Plan does not involve all students in the District in both grades) would involve progressively massive transportation, the uprooting of children in their earliest formative years, and would be educationally dysfunctional. Considering the "age of the children, and the risk to health and probable impingement of the educational process," United States v. Texas Education Agency (Austin Independent School District), 467 F.2d 848, 885 (5th Cir. 1972) (Bell, J., specially concurring), we find that the time required for transportation, risk to health, and probable impingement of education for students younger than the sixth grade would be prohibitive under any such plan.

In assessing the AISD's proposal, we note the language of Mr. Justice Powell:

> The term "integrated school systems" presupposes, of course, a total absence of any laws, regulations of policies supportive of the type of "legalized" segregation condemned in Brown. A system would be integrated in accord with constitutional standards if the responsible authorities had taken appropriate steps to (i) integrate faculties and administration; (ii) scrupulously assure equality of facilities, instruction and curricula opportunities throughout the district; (iii) utilize their authority to draw attendance zones to promote integration; (iv) locate new schools, close old ones, and determine the size and grade categories with the same objective in mind. Where school authorities decide to undertake the transportation of students, this also must be with integrative opportunities in mind.
>
> . . . An integrated school system does not mean—and indeed could not mean in view of the residential patterns of most of our major metropolitan areas—that *every school* must in fact be an integrated unit. A school which happens to be all or predominantly white or all or predominantly black is not a "segregated" school in an unconstitutional sense if the system itself is a genuinely integrated one.

Keyes, supra at 5012 (Powell, J., concurring in part and dissenting in part). We note that in addition to its submitted Sixth Grade Center Plan the AISD has taken other steps to effect its conversion to a unitary integrated system, including: (i) A commitment to employ a black and a Mexican-American assistant superintendent to work at the cabinet level with system-wide responsibilities and to provide special assistance in the development of programs and activities for black and Mexican-American students; (ii) Establishment of majority-to-minority transfer provisions

for both black and Mexican-American students, with free transportation provided; (iii) A commitment to employ five elementary assistant directors who will, *inter alia*, supervise and evaluate programs; (iv) Implementation of many innovative programs designed to aid minority students, including bilingual-bicultural educational programs; (v) Alteration of existing school attendance zones and the drawing of attendance zones for new schools to promote desegregation; and (vi) Construction and projection of new schools to be located in such a manner as to maximize integration.

Thus, although the Sixth Grade Center Plan contemplates the continued operation of several predominantly black schools, we find that it, combined with the District's other efforts and commitments, will render the AISD to be a unitary and integrated school system. In approving the Plan, however, we wish to emphasize that all its components are a legal obligation of the District. The District's commitments—to integrate the administration, to maintain an integrated faculty and continue to seek qualified Mexican-American teachers, to assign faculty members to schools in a nondiscriminatory manner (we construe this to mean that teachers in predominantly minority schools shall be equivalent to teachers in predominantly Anglo schools according to such objective criteria as experience and educational background), to scrupulously assure equality of facilities, to assure equality of educational opportunities through programs especially designed to meet the needs of black and Mexican-American students, to utilize its authority to draw attendance zones to promote integration, and to locate new schools, close old ones, and determine the size and grade categories to promote inte-

gration—are all legal obligations which shall be strictly enforced by the Court. Likewise, the District must afford Mexican-American's protection against bearing a disproportionate burden of desegregation of black students, and must promote rather than retard tri-ethnic integration as part of its legal obligation.

This Court shall retain jurisdiction of this cause, and the School District is directed to report to the Court semi-annually, on or about January 15, and July 15, of each year, regarding the status of integration in the AISD. Included in these reports shall be: the status of faculty and administration integration; the comparative objective qualifications of teachers in predominantly minority schools *vis-a-vis* the objective qualifications of teachers of that grade level in the District as a whole; the addition or elimination of any programs especially designed to meet the educational needs of black and Mexican-American students; the status of efforts to draw school attendance zones and locate new schools to promote integration; the status of the District's commitment to scrupulously assure equality of facilities; a report regarding utilization of the District's majority-to-minority transfer plan; and the status of student integration in each school in the District. Additionally, this Court shall require that prior to any change in school attendance zones and prior to construction of any new school by the District, the Board shall notify counsel for Plaintiff and Intervenors of such proposal. If, within thirty (30) days, counsel for Plaintiff and Intervenors have made no objection thereto, the proposal shall be considered approved by the Court. If, within thirty (30) days, objection is made, the Court shall hear and resolve the dispute by approving or disapproving the proposal. It is accordingly

ORDERED, ADJUDGED and DECREED that the Sixth Grade Center Plan submitted by the Austin Independent School District be, and hereby is, APPROVED, under the terms and conditions set out herein. We attach hereto, and incorporate herein, a copy of the Plan. This Memorandum Opinion and Order shall constitute Findings of Fact and Conclusions of Law.

Entered at Austin, Texas, this 1st day of August, 1973.

United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA	( )	
	( )	
	( )	
	( )	**Civil**
VS.	( )	**Action**
	( )	**No. A-**
	( )	**70-CA-80**
	( )	
TEXAS EDUCATION AGENCY, ET AL.	( )	
(Austin Ind. School District)	( )	

MEMORANDUM OPINION AND ORDER

On June 28, 1971, this Court entered an Order determining the absence of *de jure* segregation against Mexican Americans, but the continuation of the vestiges of a dual school system as regards Blacks. This Order incorporates that earlier Memorandum Opinion and Order and proceeds to outline a plan for eliminating the dual school system.

Despite this Court's repeated requests for a joint plan, the parties were able to agree only as to the high school integration plan submitted by the Austin Independent School District. *See* Report and Submission filed July 15, 1971. As regards junior highs, the Plaintiff continued to disregard this Court's guideline three as to the unsuitability of Anderson for a junior or senior high facility. The previously determined unsuitability of the Anderson facility, the greater costs, and longer transportation time involved in the Plaintiff's plan require this Court to reject it. *See* Defendant's Exhibits 37 and 82.

In reviewing the plans submitted for elementary school integration, this Court first reiterates its guideline calling for minimized busing. The testimony at the earlier hearing of this case convinced this Court that extensive crosstown busing could only harm the local education system. Dr. Cecil Hardesty, Superintendent of Schools in Jacksonville, Florida, an unbiased educational expert who has had extensive experience with crosstown busing ordered in his school district, delineated the many adverse effects from this remedial technique. The added time requirements imposed on students by busing often reduce attendance and produce higher dropout rates, especially among minority students, and limit the opportunity of all transported students to participate before and after school in extracurricular activities, which both parties agree are an important factor in the educational process. Busing similarly reduces parental participation in school activities, particularly where it necessitates dividing a family's children among a number of schools. It also taxes the capability of health facilities in individual schools to deal with at-school injuries and illnesses. Of course, the objections to busing thus far enumerated might in many circumstances apply with equal validity to the traditional role bus transportation has played in overcoming the geographical separation between pupil and school. However, such objections take on a new and much larger dimension in the urban environment where massive transportation of students is involved.

Moreover, both Dr. Hardesty and Dr. Davidson further testified that busing students simply to achieve racial balance, as opposed to the traditional function of bus transportation, raises new educational problems not heretofore experienced. Transportation of students, particularly the very young, from their home neighborhoods into strange and often hostile environments causes raised anxiety levels in both students and their teachers that constitute psychological barriers to learning progress, and subjects students to traumatic experiences that they are not equipped by age or experience to handle. The Court is also aware of other barriers posed by community opposition to forced busing. Cf. United States v. Haynes, _____F.2d_____ No. 71-1165 (5th Cir. June 17, 1971). Because such large numbers of students must be transported within a reasonably short period of time, busing to achieve desegregation in Austin will necessitate assembly of students at their neighborhood schools prior to transporting them to another school. Thus inclement weather may pose problems in sheltering up to twice the school's student capacity during the busing period in the morning and afternoon. Moreover, in Austin, the bus routes would require transporting many students through a heavy traffic complex consisting of downtown Austin (Colorado River to 11th Street), the Capitol complex (12th Street to 19th Street) and the University of Texas campus (19th Street to approximately 27th Street). The traffic situation is further complicated by the fact that Interstate Highway 35, which is the main north-south traffic artery in Austin, is undergoing major construction work involving the closing of traffic lanes and various detours. This Court therefore finds that the traffic situation presents a serious and

substantial obstacle to the safe transportation of school children. Finally, it should be noted that transportation costs in excess of those normally incurred in the traditional function of busing are essentially a non-productive expenditure, since such costs contribute little, if anything to academic achievement. Dollars spent on additional buses, driver's salaries, gasoline, tires and other maintenance yield little or no educational return to the community; dollars spent on productive programs, teacher's salaries, books, facilities and teaching equipment do.

Accordingly, this Court finds as a fact that busing to achieve desegregation in the Austin community will result in serious interference with the educational process. Because of this, the Court has examined both the HEW Recommendations and the AISD plan with a view toward minimizing busing and maximizing the use of neighborhood schools. Normally, in fashioning a remedy, the recommendations of the Department of Health, Education & Welfare are entitled to great weight, U.S. v. Jefferson County Board of Education, 372 F.2d 836, 847 (5th Cir. 1966), and "the school districts are to bear the burden of demonstrating beyond question, after a hearing, the unworkability of the [HEW] proposals . . . ." Carter v. West Feliciana Parish School Bd., 396 U.S. 290, 292 (1969) (concurring opinion of Justice Harlan.) In the instant case, however, the evidence adduced at trial, especially the uncontradicted testimony of Mr. Cunningham and Dr. Davidson, shows that despite AISD's repeated attempts to communicate with HEW, over a period of several months, nothing was forthcoming from HEW until approximately 30 days prior to trial. At this time, HEW filed with this Court its comments on the desegregation

plan formulated by the AISD. These comments (Letter from Thomas Kendrick, Senior Program Officer to Dr. Jack Davidson, Superintendent, AISD, dated and filed May 14, 1971) [Hereinafter called HEW Recommendations] as they have been amended at trial through the introduction of Plaintiff's Exhibits 23, 25 and 26, and the Report and Submission filed with this Court on July 15, 1971, constitute the only documentary evidence of any desegregation plan developed by HEW. At trial, several further modifications to the HEW Recommendations were revealed for the first time through the oral testimony of Mr. A. T. Miller, the HEW Project Officer. The only explanation offered by HEW for this course of conduct was the testimony of Mr. Miller that he was not authorized to deviate from the HEW plan, which had been drawn in Washington, D.C., but that he had been "available" for consultation throughout the pendency of the suit. The fact remains, however, that the AISD was not given the benefit of HEW recommendations in drawing its plan, despite repeated efforts to obtain such recommendations, until approximately 30 days prior to trial. This inflexibility on the part of HEW is inconsistent with this Court's understanding of the role to be played by HEW in the complex, difficult task of urban school desegregation, and it is further inconsistent with the clear and obvious purpose of this Court's Order of September 4, 1970, directing the parties to attempt agreement on a common desegregation plan. This case thus appears to depart substantially from the usual run of school cases in that here the uncommunicative, uncooperative and recalcitrant party has been not the local school board, but the Department of Health, Education and Welfare.

This Court has therefore weighed both plans according to their relative merits under the two-pronged test developed in the cases:

(1) Does the plan convert *now* the existing dual school system "to a unitary system in which racial discrimination would be eliminated root and branch?" Green v. County School Board, 391 U.S. 430, 437-38 (1969), and

(2) Is the plan "reasonable, realistic and workable?", Swann v. Charlotte-Mecklenburg Board of Education, supra, at 575.

HIGH SCHOOLS

The parties have agreed that the plan submitted by AISD for implementation in the Fall of 1971 (see Defendants' Exhibits Nos. 35 and 37) would assign all black high school students to schools that are not identifiable as Negro schools, (Report and Submission of July 15, 1971, at I), and the Court so finds. The AISD plan for the high schools, (Alternate Plan No. 2, for the 1971-72 school year) together with the planned construction of three new high schools and proposed revision of attendance zones, (Alternate Plan No. I, for the 1973-74 school year) meets all constitutional requirements and is therefore APPROVED.

JUNIOR HIGH SCHOOLS

The parties similarly agree that the AISD plan for junior high schools, (Defendants' Exhibit No. 36, Alternate Plan

No. 2, as modified by the closing of Kealing Jr. High School for the 1971-72 school year) would assign all black junior high school students to schools that are not identifiable as Negro schools, although HEW expresses doubt that this would comply with the fourth guideline contained in this Court's Memorandum Opinion and Order of June 28, 1971, since it, together with AISD's high school plan "unnecessarily places on the black community the entire burden of desegregating on the secondary level." Report and Submission of July 15, 1971, at 2-3. The guideline in question was addressed to any attempt on the part of either party to achieve desegregation merely by integrating blacks with Mexican-Americans as opposed to integrating them throughout the entire community. Although some of the same considerations of fairness support HEW's position, this Court believes that they are outweighed by the continuity of zone lines and feeder patterns, decreased likelihood of "white flight", transportation efficiencies and coordination with the AISD elementary plan afforded by the AISD junior high plan. Moreover, the HEW proposals for secondary schools disregard an additional cost of some $246,200. for portable buildings made necessary by the crowding of some facilities and drastic underutilization of others under the HEW plan, and involves the use of Anderson High School as a junior high facility, which this Court finds unsatisfactory. The AISD junior high school plan (Alternate Plan No. 2), as modified by the closing of Kealing Jr. High, also meets all constitutional requirements and is APPROVED.

ELEMENTARY SCHOOLS

Austin's 55 elementary schools, which are widely scattered across the city to meet neighborhood needs, pose the major problem in implementing an effective desegregation program. HEW suggests pairing for a few contiguous attendance zones, but in the main recommends the groups of contiguous zones be "clustered" with "satellite" or noncontiguous zones. *See* HEW Recommendations at 3-5 and Attachment 1, and Plaintiff's Exhibit 1. Each cluster, usually consisting of one predominately Black school, one predominately Mexican-American school, and four predominately Anglo schools, would be thoroughly integrated on a daily basis through extensive cross-town busing. Mr. Miller, the HEW Project Officer, indicated that in each cluster all students in one of the schools, or several grades could be divided among several of the schools in the cluster. In the Report and Submission of July 15, 1971, HEW further suggests "full time pairing of the five all-black elementary schools (counting Rosewood and Oak Springs as one school encompassing grades one through six) with ten or more non-contiguous Anglo schools."

While employing a form of clustering similar to that proposed by HEW at trial, (*See* Defendant's Exhibit 78 at 16) AISD offers a unique new approach to elementary desegregation. Integrating not only people, but the entire educational process, the AISD plan creates learning resource centers, provides inter-school visitations, and sponsors joint field study trips. A "Companion School Team Planning Advisory Council", composed of representatives from each school in a given cluster as well as

staff representatives, would develop integrated educational programs for the cluster. As explained more fully in Defendant's Exhibit 80,

> [t]he primary purpose of the multi-cultural learning activities at the Learning Resource Centers is to provide new dimensions of understanding by placing greater emphasis on the cultural influences and contributions of various ethnic groups of American society.

To accomplish this objective, one center each for fine arts, social sciences, avocations, and science, would be established in vacant or underutilized facilities designated by AISD. According to Defendant's Exhibit 78, "Major Program Thrusts" would be "1. Bolster academic programs in one race schools (cognitive learning) [and] 2. Develop wholesome attitudes and understandings (affective learning)." As "a major portion of the social studies curriculum", these centers will concentrate on "instructional groups" "composed of "four multi-ethnic student teams consisting of 6, 7, or 8 students each, depending on the size of the companion school group." Defendant's Exhibit 80. These instructional groups would regularly be assembled for inter-school visits, field study trips, and planned programs at the learning resource centers. The bus transportation used both to assemble the groups and transport them to these activities would be integrated into the educational program through the use of supervised on-bus activities.

Under the AISD plan the Court finds that elementary students would be in a desegregated environment as much as twenty-five (25) percent of the school year. This Court

further finds that the AISD elementary plan, particularly in its creation of learning resource centers, possesses great educational benefits. It is a program designed specifically to develop in elementary school children the capacity to understand, appreciate and respect cultural values other than their own by providing, in a structured, supervised program, a common bond of experience with members of other ethnic groups. The central thrust of the AISD plan is to eliminate the mutual fears that lie at the heart of racial prejudice, and the discriminatory attitudes that flow from such fears, through educational activities specifically tailored to reach this objective. Its underlying premise is that meaningful and effective desegregation depends primarily on the quality, and only secondarily on the quantity, of the multicultural experiences to which each elementary school child is exposed.

HEW attempts to stigmatize this innovative proposal with the label "part-time desegregation", relying on *Bivins v. Bibb County Board of Education*, 424 F.2d 97,98 (5th Civ. 1970) where only 25% of the Negro students were attending formerly all-white schools and only "nine percent of the white students were participating or waiting to participate on a part-time basis in virtually all of the all-Negro schools in response to the incentive of special courses there . . . ." No such scheme is proposed by the AISD elementary plan, which is mandatory on all elementary students and which encompasses virtually all of the system's Anglo elementary students for a much larger portion of their academic time in a far wider and more meaningful range of multicultural experiences. This Court therefore considers *Bivins v. Bibb County, supra,* inapplicable to this case.

Nor can the HEW Recommendations be said to provide more satisfactory distribution of ethnic groups. Plaintiff's Cluster #5, when examined in view of the more accurate enrollment figures provided in Defendant's Exhibit 79, includes only eighteen Blacks or about 1% of the cluster's student population; Cluster #6 includes only twenty-one Blacks or about 2%. *See* HEW Recommendations, Attach. E for composition of clusters. At the same time HEW would pair three schools—Becker, Mathews, and Pease—which, as indicated in Defendant's Exhibit 79, are already integrated on a tri-ethnic basis.

While the HEW Recommendations strictly avoid any discussion of implementation methods, which, of course, form the core of any determination as to reasonableness and workability, Mr. Miller's testimony indicates almost total reliance upon extended daily busing of 89% elementary students. *See* Plaintiff's Exhibit 26. This Court finds as a matter of fact that this proposal entails all the educational disadvantages of busing previously discussed. Moreover, the cost comparison of the HEW proposal with that of AISD is startling. Because the AISD can employ during the school day at the elementary level the same buses used to transport secondary students, no additional equipment is required. Consequently, expenditures would be held to $100,000. in operating costs. Defendant's Exhibit 82. In this same exhibit, the AISD estimates that the HEW elementary proposal would cost $1,708,000.—$1,573,000. for transportation, and $135,000. for additional portable rooms. Even the Plaintiff's Exhibit 26, with its understatement of the number of buses required to implement the HEW Recommendations estimates total first year costs of $717,900. This Court finds as a matter

of fact that, by either estimate, the cost of this proposal places an unreasonable burden upon the school district. This Court further finds that the minimum number of buses necessary to implement the HEW proposals cannot be obtained until late in the 1971-72 school year. See direct testimony of Dr. Leon R. Graham.

After a review of the evidence, particularly Defendant's Exhibit 82, Attach. A, this Court finds that the AISD plan is preferable also because it imposes lesser time burdens on students in going to and from school and lessens traffic hazards. Unlike the HEW Recommendations, the limited amount of busing required by the AISD will occur during hours of lessened traffic flow, as a part of the learning day with teacher participation. This Court finds that the AISD plan minimizes the disadvantages inherent in busing.

The AISD elementary plan is a wholly new approach to the problems of desegregating elementary schools locked deeply in areas of urban minority concentration. Under difficult circumstances, the plan achieves maximum desegregation consistent with reasonable cost, student safety and educational soundness. It is the finding of this Court that Defendants have met their burden of showing the non-feasibility of the HEW proposals, and that the AISD elementary plan is the only physically possible desegregation plan for the 1971-72 school year because of the non-availability of additional buses until late in the second semester.

With the closing of St. John's Elementary School, a predominantly black school, the students of which can easily be assigned to neighboring schools, and the addition of a majority-to-minority transfer provision, the AISD elementary plan will also meet all constitutional requirements.

CONCLUSION

Upon implementation of the AISD plans for the high schools, junior high schools and elementary schools, as modified herein, the defendant school district will be in full compliance with the previous Orders of this Court dated September 4, 1970, December 15, 1970, February 26, 1971, and April 14, 1971, all terms of the Civil Rights Act of 1964, and the constitutional principles announced in Brown v. Board of Education, 347 U.S. 483 (1954), Green v. County School Board, 391 U.S. 430 (1968), and Swann v. Charlotte-Mecklenburg Board of Education, _____ U.S. _____, 28 L.Ed.2d 554 (1971), and will have achieved a unitary school system. This memorandum Opinion shall constitute this Court's findings of fact and conclusions of law pursuant to Rule 52, Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing memorandum Opinion, it is ORDERED, ADJUDGED and DECREED that"

1. Alternate Plan No. 2, proposed by the Austin School Board, is to be put into immediate effect subject to the following modifications:

a. Kealing Junior High School is to be closed for school year of 1971-72.

b. St. Johns Elementary School is to be closed and its students reassigned to the neighboring white schools.

c. Paragraphs B, C, F and G of the interim Desegregation Plan for the Austin Independent School District

implemented by this Court's Order of September 4, 1970, shall remain in effect.

2. The site locations for the proposed high schools, junior high schools, and elementary schools are hereby approved; the School Board is further ORDERED to report back to this Court on June 1, 1972, and every six (6) months thereafter, on the site acquisition, progress, planning and construction of new schools.

3. Since the AISD plan for elementary desegregation is unique in approach, the Board will report to this Court on October 1, 1971, and each February 1, and June 1, of succeeding years the progress made in desegregation at all levels with special emphasis on information pertinent to the elementary program, such reports to include, but not be limited to, student involvement, racial composition of staff and students, participation in extracurricular activities, and transportation utilized to accomplish both Board Alternate Plan No. 2 and the AISD plan for elementary schools.

4. Prior to the occupation of the new high schools and junior high schools at Northeast High School, Northwest High School, Austin High School, Rundberg Lane Junior High School, Northeast Junior High School, and the South First Street Junior High School, the Board will submit to this Court a projected ethnic composition for each school so that this Court can determine whether the features of Alternate Plan No. 2 should be continued or altered.

5. As authorized by the Supreme Court in *Swan v. Charlotte-Mecklenburg Board of Education, supra,* this Court will retain jurisdiction of this case to insure that the unitary system hereinabove provided and required is oper-

ated in accordance with these Orders to achieve the objective specified. For this purpose, it is required that the Austin School Board shall, on or before the 1st day of the months of November, December, February, March, April and May, during the 1971-72 school year, submit to this court reports each of which shall cover the following topics:

a. Students, including (1) the number of students by race enrolled in the school district; (2) the number of students by race enrolled in each school in the district; (3) the number of students by race enrolled in each classroom in each of the schools in the district; and (4) the number of school days during each month that each child has participated in multi-cultural activities pursuant to the elementary school program, broken down by learning resource center visits, inter-site visits, and field-study trips.

b. Teachers, including (1) the number of full-time teachers by race in the district; (2) the number of full-time teachers by race in each school in the district; (3) the number of part-time teachers by race in the district; and (4) the number of part-time teachers by race in each school in the district.

c. Transfers, describing the requests and results which have accrued by race, under the majority-to-minority transfer provision which is a part of this Court's Order.

d. Specifying any change which may have been made in the boundaries of any zone or zones.

e. Transportation system, including the number of vehicles in use and the extent to which black and white students are transported daily on the same buses.

f. Utilization of equipment, including a statement that all gymnasia, auditoriums, cafeterias and like facilities are being operated on an integrated basis.

6. If it appears that the plan hereby adopted does not in actual fact and in operation provide the unitary system for which it was designed and adopted, the Order of this Court may be changed to whatever extent necessary to accomplish the objective.

SIGNED at Austin, Texas, this _____ day of July, 1971.

_____

United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA	( )	
	( )	
	( )	**Civil**
	( )	**Action**
VS.	( )	**No. A-**
	( )	**70-CA-80**
	( )	
	( )	
TEXAS EDUCATION AGENCY, ET AL.	( )	
(Austin Ind. School District)	( )	

MEMORANDUM OPINION AND ORDER

On August 7, 1970, the Attorney General of the United States, on behalf of the United States, initiated this action against the Texas Education Agency, the State Commissioner of Education, and seven school districts. This Opinion constitutes Findings of Fact and Conclusions of Law concerning those allegations against Defendant Austin Independent School District [hereinafter referred to as AISD].

Plaintiff alleges that AISD, contrary to the Civil Rights Act of 1964, 42 U.S.C. §2000c-6(a) and (b) and the Fourteenth Amendment to the United States Constitution, "has traditionally operated and continues to operate a dual school system based on race." In addition, Plaintiff

contends that AISD is "discriminating against Mexican-American students by assigning Mexican-American students to schools on the basis of their ethnic origin . . . . [and by] maintaining schools that are identifiable as Mexican-American schools, and schools that are attended almost exclusively by Mexican-American and Negro students."

On August 27, 1970, this Court held a hearing concerning the AISD and entered an oral Order implementing the Interim Desegregation Plan formulated by the Department of Health, Education and Welfare. After the modification of this Order on September 4, 1970, the parties were given until December 15, 1970, to submit a common plan providing for the complete desegregation of the AISD. Despite four further Orders of this Court extending this deadline, cooperation between the parties was most limited and no common plan was produced.

On May 14, 1971, Plaintiff and Defendant submitted their separate desegregation plans. Consideration of these

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[1]The Swann decision has been considered in other stages of litigation. Gaines v. Dougherty County Bd. of Education, _____F.2d_____, No. 30290 (5th Cir. June 7, 1971) (remanding student assignment plan); Davis v. School Dist. of the City of Pontiac, Inc., _____F.2d_____, No. 20477 (6th Cir. May 28, 1971) (affirming a district court desegregation plan); Johnson v. San Francisco United School Dist., _____ F.Supp. _____, No. C-70 1331 SAW (N.D. Cal. April 28, 1971) (requiring parties to file desegregation plan); Ross v. Eckels, _____F.Supp._____, No. 10444 (S.D. Tex. May 24, 1971) (denying motions to amend and to intervene).

For an excellent analysis of Swann and earlier desegregation rulings see Comment, *Busing, Swann v. Charlotte-Mecklenburg and the future of Desegregation in the Fifth Circuit*, 49 TEX.L.REV. _____1971.

plans resulted in a full scale desegregation trial.

AISD is currently composed of 54,970 students of whom 64.6% are Anglo; 20.4%, Mexican American; and 15.1%, Black. Plaintiff's Exhibit 59, at 11. These demographic data raise an initial question posed to the Court—the effect of a large ethnic minority group other than Blacks upon efforts to dismantle a dual school system. That Mexican Americans constitute a separate ethnic group has been recognized by several earlier decisions,[2] by this Court in its appointment of a *Tri-Ethnic* as distinguished from a *Bi-Racial* Advisory Committee,[3] by the testimony of AISD Superintendent, Dr. Jack Davidson, and by even the most casual examination of Mexican American culture. But the mere existence of an ethnic group, regardless of its racial origin, and standing alone, does not establish a case for integrating it with the remainder of the school population. Rather the Plaintiff must show that there has been some form of *de jure* segregation against the ethnic minority. In considering the Defendant's actions, this Court adopts the broad standard expressed in Davis v. School District of the City of Pontiac, 309 F.Supp. 734, 742 (E.D. Mich. 1970), aff'd, _____ F.2d _____, No. 20,477 (6th Cir., May 28, 1971).

> Where a Board of Education has contributed and played a major role in the development and growth of a segregated situation, the Board is guilty of *de jure* segregation.

[2]See, e.g., Hernandez v. Texas, 347 U.S. 475 (1954); Cisneros v. Corpus Christi Ind. School Dist., _____F.Supp. _____, No. 68-C-95 (S.D. Tex. June 4, 1970), noted, 49 TEX. L.REV. 337 (1971); Clifton Puente, 218 S.W.2d 272 (Tex. Civ.App. San Antonio 1948, writ ref'd n.r.e.).

[3]Order of this Court, September 4, 1970.

While alleging such de jure segregation, against Mexican Americans, the Plaintiff failed in maintaining its burden of proof.

Texas has never required by law that Mexican American children be segregated, and the AISD, unlike some other school systems,[4] has never enacted regulations to this effect. Since no discriminatory rule or regulation has existed, Plaintiff has sought to demonstrate a history of discriminatory practices against Mexican Americans. All that Plaintiff has succeeded in showing is that at one time the AISD had overlapping school zones for Pease and the West Avenue schools, and for Metz and Zavala. During this period, prior to World War II, the West Avenue and Zavala schools were referred to as "Mexican" schools, since their enrollment was totally Mexican American, and since their programs were designed to meet the needs of a largely migrant population with a fluctuating attendance pattern. Even during this period, there were a number of Mexican Americans attending the so-called "Anglo" schools.[5] A pattern of *de jure* segregation is not established by the statement of a former student that Mexican Americans were encouraged to attend Zavala rather

[4]See, e.g., Gonzales v. Sheely, 96 F.Supp. 1004 (D. Ariz. 1951); Mendez v. Westminister School Dist., 64 F.Supp. 544 (S.D. Cal. 1946), aff'd, 161 F.2d 774 (9th Cir. 1947); Ind. School Dist. v. Salvatierra, 33 S.W.2d 790 (Tex.Civ.App. San Antonio 1930, no writ), appeal dismissed w.o.j. & cert. denied, 284 U.S. 580 (1931).

[5]Defendant's Exhibit 69, as explained by the testimony of Arthur Cunningham, Pupil Placement Officer for AISD.

than Metz in 1936-41,[6] the testimony of an educational expert that concentration of Mexican Americans in certain schools is detrimental,[7] the opinion of an interested, but non-expert citizen that segregation continues,[8] and the implication of a recent student that the education in one minority school is inferior.[9] The only other evidence on the issue of Mexican American segregation consists of testimony by certain AISD administrators and former school board members.[10] Taken as a whole, the testimony of the witnesses, particularly that of Dr. Wilburn, Mr. Cunningham, and Dr. Davidson, conclusively shows that at no time during the existence of the AISD has there been *de jure* segregation against Mexican Americans,[11] and this

[6]Testimony of Richard Moya, Travis County Precinct 4 Commissioner.

[7]Testimony of Dr. George Sanchez.

[8]Testimony of Dr. Jorge Lara-Braud.

[9]Testimony of Mr. Alfred Munoz.

[10]Testimony of Mr. Willie Kocurek, Mr. Graham, Mr. C. N. Avery, Mr. Noble Prentice, and Mr. Will Davis.

[11]Because of this finding, which is limited to the factual setting existing in the AISD, the Court is under no constitutional obligation to integrate Mexican Americans throughout the school system. This is not to say that the mere integration of Mexican Americans with Blacks is legally sufficient to meet the command of Brown I, Brown II, and Swann. Such a plan, by placing the burden of integration upon another ethnic minority rather than upon the entire community, would clearly be inconsistent with the equitable principles which these decisions make obligatory on this Court. Moreover, Dr. Davidson specifically indicated that an earlier HEW plan to mix Blacks and Mexican Americans was not a sound educational proposal. Surely such a plan would accomplish none of the objectives announced in Brown and subsequent decisions.

Court so finds.[12]

A different situation exists as regards Black students. It is undisputed that at one time the AISD maintained a dual school system with educational opportunities separate and inherently unequal for Blacks. However, unlike many communities elsewhere in the South, the City of Austin has since *Brown II* adopted a progressive and non-discriminatory policy in the administration of its public schools. The government has made no showing that in the period from 1955 to the present the AISD has intentionally perpetuated segregation of Blacks; the record instead indicates that during this period the school administration's

[12]Specifically, the Court makes the following findings of fact, based on the record as a whole:

(a) The Austin Independent School District has never adopted, published or promulgated any written or unwritten rules, regulations or policies having as their purpose the discrimination against, or segregation or isolation of, Mexican Americans.

(b) The Austin Independent School District has never discriminated against, or attempted to discriminate against, isolate or segregate Mexican Americans in any form whatsoever, particularly in:

(1) site location of schools;
(2) school construction;
(3) drawing of school attendance zones;
(4) student assignments;
(5) faculty assignments;
(6) staff assignments;
(7) faculty and staff employment;
(8) extracurricular activities; and
(9) transportation.

(c) The Zavala and West Elementary Schools were not built for the purpose of discriminating against, isolating or segregating students on the basis of Mexican American ethnic origin.

official acts have not been motivated by any discriminatory purpose.[13] The Court therefore deals in this case only with vestiges of state-imposed segregation, in the form of some all-white and all black schools, that survived under a racially-neutral policy on the part of the local authorities. In this connection, it should be observed that those one-race schools that do exist in the system take much of their present character from historical residential patterns that developed from economic factors and from "the myriad factors of human existence which can cause discrimination in a multitude of ways on racial, religious or ethnic grounds."[14] That is to say, the racial composition of these schools, whether white, black or Mexican American, closely tracks the demography of the neighborhoods in which they are located, and while the racial segregation of Blacks formerly imposed by statute in Texas may at one time have influenced the development of these patterns, no persuasive evidence has been introduced that the local school authorities have purposefully sought to perpetuate them following repeal of the statute.

Swann v. Charlotte-Mecklenburg Bd. of Educ., supra, 28 L.Ed. 2d at 568, relying upon Green v. County School Bd., 391 U.S. 430, 435 (1968), announced that in addition to pupil placement,

> existing policy and practice with regard to faculty, staff, transportation, extracurricular activities, and facilities were among the most important indicia of a segregated system.

[13]See especially testimony of Mr. Cunningham.

[14]Swann v. Charlotte Mecklenburg Bd. of Educ., supra, 28 L.Ed.2d at 570.

Reviewing these criteria, this Court finds that the AISD has adequately desegregated faculty and staff,[15] transportation, [16] extracurricular activities,[17] and facilities.

As regards the last criterion, Plaintiff argues that the AISD has purposefully located school facilities so as to perpetuate segregation of minorities. However, the evidence adduced at trial, especially the testimony of Mr. Cunningham, shows that the AISD has followed a policy of "racial neutrality" in locating facilities. The AISD considers neighborhood need, not race, in choosing school sites.

Thus far, the Court has held that no *de jure* discrimination on the basis of race or ethnic origin has ever been practiced against Mexican-Americans in the operation of the AISD, but that vestiges of a dual system continue to exist with respect to Blacks. In light of this ruling on the Mexican-American issue, the Court is of the opinion that the parties should be given an opportunity to conduct further negotiations aimed at agreement on a common plan for the desegregation of Austin schools. It is evident that in drawing the plans heretofore submitted the parties contemplated that the Court might rule otherwise on this issue; therefore even if a common plan cannot be agreed upon the parties should be allowed to make such revisions to their individual proposals as they may deem necessary or desirable. This will ensure full and fair consideration of all the alternative remedies available for resolving the complex and difficult problems presented.

The Court offers the parties the following guidelines as they review their plans:

[15]See especially Defendant's Exhibit 79.

[16]See especially Defendant's Exhibit 24.

[17]See especially Defendant's Exhibit 81.

(1) The parties should explore every possible avenue for arriving at a common plan. This directive simply renews and emphasizes the plain import of the Court's earlier Order of September 4, 1970, and the four separate extensions thereof, which were given the parties so that such negotiation could take place. The evidence adduced at trial revealed little, if any, effort by the parties to cooperate in compliance with these orders, and now that the parties have presented their separate plans the desirability of cooperation appears all the more obvious. A comparison of the projected enrollment figures for high schools and junior high schools from Plaintiff's Exhibits 22 and 24 with Defendant's Exhibit 37 reveals that the parties are very close to agreement, at least as to these portions of their proposals. Consequently, the Court directs the parties to develop a common proposal to resolve part of the desegregation problem, even if they cannot agree on a plan for the elementary schools. It will be far more desirable for all concerned to have the parties combine the best elements of their separate plans than to have the Court draw its own plan.

(2) By far the most pressing issue in this case is the extent to which transportation of students by bus should be utilized in achieving a unitary system. "The importance of bus transportation as a normal and accepted tool of educational policy" has been recognized by the Supreme Court[18] and by both parties to this suit in the plans they have submitted. Furthermore, it is now clear that "bus transportation as one tool of school desegregation" falls

[18]Swann v. Charlotte-Mecklenburg Board of Education, supra, at 574.

within the Court's power to provide equitable relief.[19] However, the evidence adduced at trial persuades this Court that there are severe practical limitation on the degree of busing that should be ordered in aid of desegregation. Therefore, the Court encourages the parties to combine the best elements of both their plans with a view toward minimizing busing.

(3) The testimony at trial makes clear the impossibility of the continued use of the Anderson facility as either a junior or senior high school. The size of the facility and its location away from major traffic arteries, as well as the difficulty of drawing a realistic attendance zone that will include Anglos make it impossible to integrate this school. Therefore, the parties should avoid plans which include Anderson as a junior or senior high school.

(4) Finally, the import of this Court's decision on the Mexican-American question should be clarified. Although the Court has determined that *de jure* segregation of Mexican-Americans does not exist, the Court will nevertheless consider the effect upon this ethnic minority of any plan submitted by the parties. The entire community, not just one segment of it, must bear the burden of integration. Furthermore, as both Dr. Davidson and Dr. Sanchez appropriately testified, there will be little educational value in a plan which merely integrates one socially and economically disadvantaged ethnic group, the Blacks, with another, the Mexican-Americans.

IT IS THEREFORE ORDERED that the Office of Education, United States Department of Health, Education and Welfare, and the officials of the Austin Independent

[19]*Id.* at 574-75.

School District shall immediately enter cooperative consultation respecting the proposals heretofore submitted to the Court, with the aim of agreeing upon a common desegregation plan consistent with the guidelines contained in the foregoing Memorandum Opinion.

Should the Office of Education and the school district agree upon a common desegregation plan, they shall so report to this Court by filing said plan immediately, but not later than July 16, 1971. Should the parties fail to agree in whole or in part upon a common plan, the Office of Education and the school district are both directed to file any revisions they may wish to make to all or any portion of the existing plans immediately, but not later than July 16, 1971.

SO ORDERED this the 28th day of June, 1971, at Austin, Texas.

JACK ROBERTS
UNITED STATES
DISTRICT JUDGE

AMENDMENT XIV.—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives for Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

42 U.S.C. §2000c-6. Civil actions by the Attorney General—Complaint; certification; notice to school board or college authority; institution of civil action; relief requested; jurisdiction; transportation of pupils to achieve racial balance; judicial power to insure compliance with constitutional standards; impleading additional parties as defendants

(a) Whenever the Attorney General receives a complaint in writing—

(1) signed by a parent or group of parents to the effect that his or their minor children, as members of a class of persons similarly situated, are being deprived by a school board of the equal protection of the laws, or

(2) signed by an individual, or his parent, to the effect that he has been denied admission to or not permitted to continue in attendance at a public college by reason of race, color, religion, sex or national origin, and the Attorney General believes the complaint is meritorious and certifies that the signer or signers of such complaint are unable, in his judgment, to initiate and maintain appropriate legal proceedings for relief and that the institution of an action will materially further the orderly achievement of desegregation in public education, the Attorney General is authorized, after giving notice of such complaint to the appropriate school board or college authority and after certifying that he is satisfied that such board or authority has had a reasonable time to adjust the conditions alleged in such complaint, to institute for or in the name of the United States a civil action in any appropriate district court of the United States against such parties and for such relief as may be appropriate, and such court shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, provided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise

enlarge the existing power of the court to insure compliance with constitutional standards. The Attorney General may implead as defendants such additional parties as are or become necessary to the grant of effective relief hereunder.

Persons unable to initiate and maintain legal proceedings

(b) The Attorney General may deem a person or persons unable to initiate and maintain appropriate legal proceedings within the meaning of subsection (a) of this section when such person or persons are unable, either directly or through other interested persons or organizations, to bear the expense of the litigation or to obtain effective legal representation; or whenever he is satisfied that the institution of such litigation would jeopardize the personal safety, employment, or economic standing of such person or persons, their families, or their property.

"Parent" and "complaint" defined

(c) The term "parent" as used in this section includes any person standing in loco parentis. A "complaint" as used in this section is a writing or document within the meaning of section 1001, Title 18.

Pub.L. 88-352, Title IV, §407, July 2, 1964, 78 Stat. 248; Pub.L. 92-318, Title IX, §906(a), June 23, 1972, 86 Stat. 375.

SUBCHAPTER I—EQUAL EDUCATIONAL OPPORTUNITIES
PART 1—POLICY AND PURPOSE

20 U.S.C. § 1701. Congressional declaration of policy

(a) The Congress declares it to be the policy of the United States that—

(1) all children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex, or national orgin; and

(2) the neighborhood is the appropriate basis for determining public school asignments.

(b) In order to carry out this policy, it is the purpose of this subchapter to specify appropriate remedies for the orderly removal of the vestiges of the dual school system.

Pub.L. 93-380, Title II, § 202, Aug. 21, 1974, 88 Stat. 514.

20 U.S.C. §1702. Congressional findings; necessity for Congress to specify appropriate remedies for elimination of dual school systems without affecting judicial enforcement of fifth and fourteenth amendments

(a) The Congress finds that—

(1) the maintenance of dual school systems in which students are assigned to schools solely on the basis of race, color, sex, or national origin denies to those students the equal protection of the laws guaranteed by the fourteenth amendment;

(2) for the purpose of abolishing dual school systems and eliminating the vestiges thereof, many

local educational agencies have been required to reorganize their school systems, to reassign students, and to engage in the extensive transportation of students;

(3) the implementation of desegregation plans that require extensive student transportation has, in many cases, required local educational agencies to expend large amount of funds, thereby depleting their financial resources available for the maintenance or improvement of the quality of educational facilities and instruction provided;

(4) transportation of students which creates serious risks to their health and safety, disrupts the educational process carried out with respect to such students, and impinges significantly on their educational opportunity, is excessive;

(5) the risks and harms created by excessive transportation are particularly great for children enrolled in the first six grades; and

(6) the guidelines provided by the courts for fashioning remedies to dismantle dual school systems have been, as the Supreme Court of the United States has said, "incomplete and imperfect," and have not established, a clear, rational, and uniform standard for determining the extent to which a local educational agency is required to reassign and transport its students in order to eliminate the vestiges of a dual school system.

(b) For the foregoing reasons, it is necessary and proper that the Congress, pursuant to the powers granted to it by the Constitution of the United States, specify appropriate remedies for the elimination of the

vestiges of dual school systems, except that the provisions of this chapter are not intended to modify or diminish the authority of the courts of the United States to enforce fully the fifth and fourteenth amendments to the Constitution of the United States.

Pub.L. 93-380, Title II, § 203, Aug. 21, 1974, 88 Stat. 514.

20 U.S.C. § 1704. Balance not required

The failure of an educational agency to attain a balance, on the basis of race, color, sex, or national origin, of students among its schools shall not constitute a denial of equal educational opportunity, or equal protection of the laws.

Pub.L. 93-380, Title II, § 205, Aug. 21, 1974, 88 Stat. 515.

20 U.S.C. § 1705. Assignment on neighborhood basis not a denial of equal educational opportunity

Subject to the other provisions of this subchapter, the assignment by an educational agency of a student to the school nearest his place of residence which provides the appropriate grade level and type of education for such student is not a denial of equal educational opportunity or of equal protection of the laws unless such assignment is for the purpose of segregating students on the basis of race, color, sex, or national origin, or the public school to which such student is assigned was located on its site for the purpose of segregating students on such basis.

Pub.L. 93-380, Title II, § 206, Aug. 21, 1974, 88 Stat. 515.

20 U.S.C. § 1707. Population changes without effect, per se, on school population changes

When a court of competent jurisdiction determines that a school system is desegregated, or that it meets the constitutional requirements, or that it is a unitary system, or that it has no vestiges of a dual system, and thereafter residential shifts in population occur which result in school population changes in any school within such a desegregated school system, such school population changes so occurring shall not, per se, constitute a cause for civil action for a new plan of desegregation or for modification of the court approved plan.

Pub.L. 93-380, Title II, § 208, Aug. 21, 1974, 88 Stat. 516.

Supreme Court, U. S.
FILED
JAN 26 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-897

TEXAS EDUCATION AGENCY, (Austin Independent School District), *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*, and DEBRA ESTELL OVERTON, *et al.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978
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==========

TEXAS EDUCATION AGENCY, (Austin Independent School District), et al.,

Petitioners,

v.

UNITED STATES OF AMERICA, et al., and DEBRA ESTELL OVERTON, et al.,

==========

On Petition For a Writ Of Certiorari
To The United States Court of Appeals
For the Fifth Circuit

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BRIEF IN OPPOSITION

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Debra Estell Overton, et al., black plaintiffs-intervenors below,* respectfully request that the Court deny the petition for a writ of certiorari to review the Fifth Circuit's opinion.

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*/ Debra Estell Overton, et al., black and Mexican-American school children, are students in

QUESTIONS PRESENTED

1. Whether the court of appeals correctly found insufficient evidentiary support for a per se prohibition on the use of transportation of students in the first six grades as part of any desegregation plan to disestablish admitted de jure segregation of black students?

2. Whether on remand the court of appeals correctly reconsidered the evidence in light of Washington v. Davis, 426 U.S. 229 (1976), in reaching the conclusion that segregation of Mexican-American students resulted from acts of intentional racial discrimination by the public school district?

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*/ Cont'd
schools in the Austin Independent School District who have intervened through their parents or guardians. The instant brief in opposition is filed by black plaintiffs-intervenors. Mexican-American plaintiffs-intervenors have filed a separate brief in opposition.

The Petition for Certiorari incorrectly lists the National Association for the Advancement of Colored People and the Mexican American Legal Defense and Educational Fund as Respondents. Neither organization has ever been a party to this case in any of the courts below and neither is a respondent here. See Rule 21(4).

STATEMENT OF THE CASE

Prior Proceedings, 1970-1976

a. Austin I

This triethnic school desegregation action against the Austin Independent School District was originally filed August 7, 1970. The district court initially concluded that the school district had not discriminated against Mexican-American students, but that a dual system continued to exist as to black students. Pet. App. 124. A desegregation plan was approved that closed the black secondary schools, and left segregated elementary schools intact.

The court of appeals heard the "Austin I" appeal en banc. Six judges joined in a lead opinion that black students were unlawfully segregated, that the desegregation plan was inadequate, and that "the AISD has, in the choice of school site locations, construction and renovation of schools, drawing of attendance zones, student assignment and transfer policies, and faculty and staff assignments, caused and perpetuated the segregation of Mexican-American students within the school system." 467 F.2d 848, 865-866, 870 (1972). Eight other judges joined only the result reached by the lead opinion.

b. Austin II

On remand, the district court again ruled that black students were unlawfully segregated, and ordered additional desegretation of the sixth elementary grade only. Pet. App. 94. The court again found no de jure segregation of Mexican-American students.

In 1976, in "Austin II," the Fifth Circuit affirmed that black students were subject to de jure segregation, and reversed the rulings that limited elementary level desegregation to the sixth grade and closed the black secondary schools. Pet. App. 51, 532 F.2d 380. The court also found that Mexican-American students were subject to unconstitutional de jure segregation on the basis of both the segregatory effects of a neighborhood school policy, and evidence of discriminatorily-applied policies relied on in Autin I. Pet. App. 70, 532 F.2d at 392.

c. Prior Petition for Certiorari

On December 6, 1976, the Court, per curiam, granted a petition filed by the district, vacated the judgment and remanded for reconsideration in light of Washington v. Davis, supra. Pet. App.

45, 429 U.S. 990 (1976).[1/]

Proceedings Below, 1976-1978 (Austin III)

After declining en banc consideration, the court of appeals restudied its two earlier decisions and the record ("Austin III"). The

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4/ Mr. Justice Powell, joined by the Chief Justice and Mr. Justice Rehnquist, filed a concurring opinion that:

> "As suggested by this Court's remand premised upon Washington v. Davis, supra, the Court of Appeals may have erred by a readiness to impute to school officials a segregative intent far more pervasive than the evidence justified.1/ That court also seems to have erred in ordering a desegregation plan far exceeding any identifiable violations of constitutional rights.

1/ "Although in an earlier stage in this case other findings were made which evidenced segregative intent, see, e.g., United States v. Texas Education Agency, 467 F.2d 848, 865-869 (CA 5 1972) (actions by school authorities contributing to segregation of Mexican-American students), the opinion below apparently gave controling effect to the case of neighborhood schools."

court reiterated that de jure segregation of black students was established. Pet App. 14, 564 F.2d 162. The opinion then discusses the impact of Washington v. Davis, supra, and Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977), on Austin II's reliance on a neighborhood school policy to show discriminatory intent to segregate Mexican-American students, and clarifies that Austin II was not solely based on that ground. Pet. App. 28-31, 564 F.2d at 169-170.

The court then set forth facts supporting the discriminatory segregation of Mexican-American students. The district's policies produced more racial and ethnic separation in the school than in the residential patterns of the district by resorting to a neighborhood school policy only when it would produce the maximum feasible separation of Anglos from Mexican-Americans, the establishing of specifically-designated "Mexican" schools just as the district established expressly "black" schools, unique gerrymandering of attendance zones, dual-overlapping zones otherwise used only for black-white schools, unusual school sit-

ing and capacity decisions (i.e., manipulating the design, location, and size of a school), racial assignment of faculty, and extensive use of portable classrooms to relieve overcrowding in Mexican-American schools instead of the permanent additions and new construction principally used in Anglo schools. Pet. App. 31-40, 564 F.2d at 170-174.

With respect to remedy, the Fifth Circuit remanded the case to the district court for a hearing on remedy pursuant to Dayton Board of Education v. Brinkman, 433 U.S 406 (1977). Rehearing en banc was denied again. Pet. App. 1, 579 F.2d 910.

ARGUMENT

1. For eight years both courts below have consistently found--and no party disputes--that black students in Austin ISD are subject to continuing de jure segregation and entitled to relief. However, unlike most other school systems in the South, no constitutionally adequate means of disestablishing the dual system formally imposed by state statute has ever been framed. As

to Mexican-American students, Austin III is the third time in six years, the last time pursuant to specific remand for clarification, that the Fifth Circuit has determined that pervasive specific acts constitute de jure segregation. Unless the petition is denied, yet another school year will go by without adequate desegregation. Any delay would be especially anomalous for black students. For them, there has been delay upon delay, more frustrating because the controversies which have put off vindication of their constitutional rights are largely unrelated to the measures required for eliminating vestiges of prior statutory segregation.

2. As in the previous petition filed by the district, one of the questions presented is whether the district court erred in ruling out any transportation of elementary school children in the Austin school district younger than sixth grade, in order to eliminate the segregation of black students from white students. The finding of the Fifth Circuit that there was a complete lack of record support for the district court's per se prohibition is not appropriate for review, incorrect or clearly erroneous. See Pet.

App. 16-18, 564 F.2d at 164-165. The outright prohibition of all but the last elementary grade for purposes of transportation for desegregation, regardless of the circumstances, is contrary to law. See, e.g., Flax v. Potts, 464 F.2d 865, 869 (5th Cir. 1972). Moreover, the necessary factual record for deciding whether any transportation component of a specific desegregation plan is unsuitable on account of the age of students, numbers bused or distances travelled, is totally absent. The question is premature: the court below remanded all remedy questions to the district court for further hearing.

3. Fully six years after the last evidentiary hearing, the court of appeals has again correctly determined that Mexican-American students are subject to de jure segregation. The findings were first made in 1972 in Austin I, reiterated (albeit not without ambiguity as to its significance) in 1976 in Austin II and now again in Austin III in light of Washington v. Davis; and petitioners do not dispute that the record first compiled in six days of trial in 1971 and

supplemented in 12 days of further hearings in 1973 is complete on liability issues.

Petitioners mischaracterize the opinion and ignore clearly stated reliance on classic evidentiary indicia of "'current condition of segregation resulting from intentional state action,'" Washington v. Davis, supra, 426 U.S. at 240, quoting, Keyes v. School District No. 1, 413 U.S. 189, 205 (1973), arising from invidious application of school board policies. The evidence is neither novel nor remarkable, viz., structuring attendance zones or designating feeder schools on the basis of race, building a school to a certain size and in a certain location with a conscious knowledge that it would be a segregated school, and using mobile classrooms, drafting student transfer policies, transporting students, and assigning faculty and staff on racially identifiable bases, Keyes v. School District No. 1, supra, 413 U.S. at 201-202; Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 20-21 (1971). Pet. App. 31-40, 564 F.2d at 170-174. The findings derived from the principally documentary factual record, are both appropriate and correct. Reliance on such traditional cate-

gories of fact finding in school desegregation cases suffers from no lack of clarity, and raises no colorable claim that Washington v. Davis, supra, is either misapprehended or misapplied.

At this juncture, petitioners' request for review is no more than a request to review evidence and discuss specific facts, see United States v. Johnson, 268 U.S. 220, 227 (1925).

4. We also respectfully submit that there is no need to hold the petition pending Columbus Board of Education v. Penick, 583 F.2d 787 (6th Cir. 1978) cert. granted, 47 U.S.L.W. 3463 (January 8, 1979); Dayton Board of Education v. Brinkman, 583 F.2d 243 (6th Cir. 1978), cert. granted, 47 U.S.L.W. 3463 (January 8, 1979). The Fifth Circuit has for the third time in six years, the last time pursuant to specific directions, made findings which evidence unequivocal segregative intent; no purpose would be served by delaying a hearing on remedy.

"When the official actions challenged as discriminatory include acts and decisions that do not have a firm basis in well accepted and historically sound nondiscriminatory social policy,

discriminatory intent may be inferred from the fact that those acts had foreseeable discriminatory consequences." Pet. App. 27, 564 F.2d at 168; compare Village of Arlington Heights, supra, 429 U.S at 467. This evidentiary test was applied to acts which were either expressly racial, e.g., the establishment of specifically-designated "Mexican" schools, or unusual departures from standard operating procedure in a variety of policies, each with avoidable and foreseeable discriminatory consequences. That these segregative acts were not well accepted or sound nondiscriminatory social policy is manifest, and Austin III perforce does not press the limits of any "foreseeable consequences" or other evidentiary test. The findings of fact are comparable to similar decisive findings in Swann and Keyes, and courts of appeals before[2/] and after Washington

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2/ See, e.g., Hart v. Community School Board, 512 F.2d 37, 50-51 (2d Cir. 1975).

v. Davis.[3/] The "sensitive inquiry" of evidence of intentional segregation, Village of Arlington Heights, supra, 429 U.S. at 266, therefore, raises no questions of general significance.

Moreover, in the Dayton and Columbus cases lower courts applied the remedial requirements of Dayton Board of Education v. Brinkman, 433 U.S. 406 (1977). In contrast, the Fifth Circuit remanded any consideration of remedy to the district court for further hearings. The posture of the case at this time necessarily permits no consideration of difficult questions concerning the relationship between constitutional violation and scope of relief.

3/ See, e.g., Arthur v. Nyquist, 573 F.2d 134, 141-143 (2d Cir.), cert. denied, 47 U.S.L.W. 3215 (October 2, 1978); United States v. School District of Omaha, 565 F.2d 127, 128 (8th Cir.) cert. denied, 434 U.S 1065 (1977); NAACP v. Lansing Board of Education, 559 F.2d 1042, 1045-1049 (6th Cir.), cert. denied, 434 U.S. 997 (1977).

CONCLUSION

For the above reasons, the petition for certiorari should be denied.

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No. 78-897

In the Supreme Court of the United States

OCTOBER TERM, 1978

TEXAS EDUCATION AGENCY (AUSTIN INDEPENDENT SCHOOL DISTRICT), ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals denying petitioner's request for rehearing en banc (Pet. App. 1-13) is reported at 579 F. 2d 910. The opinion of the court of appeals on remand from this Court (Pet. App. 14-44) is reported at 564 F. 2d 162. The opinion of the court of appeals on the issue of relief and on liability for discrimination against Mexican-Americans (Pet. App. 51-93) is reported at 532 F. 2d 380. The opinion of the court of appeals en banc as to liability is reported at 467 F. 2d 848. The memorandum opinions and orders of the district court as to liability and remedy (Pet. App. 94-131) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 14-44) was entered on November 21, 1977. Petitioner's request

for rehearing en banc was denied on September 7, 1978 (Pet. App. 1-13) and the petition for certiorari was filed in this Court on December 5, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals properly complied with this Court's order remanding the case for reconsideration of its earlier conclusion that petitioner had engaged in intentional discrimination against Mexican-American students in the Austin schools.

STATEMENT

The United States instituted this school desegregation suit in the United States District Court for the Western District of Texas pursuant to Section 407 of the Civil Rights Act of 1964, 42 U.S.C. 2000c-6. On September 4, 1970, the district court entered an interim order directing petitioner to implement desegregation procedures in non-student assignment aspects of school operations.

Following a six-day trial in 1971 the district court held that petitioner had not discriminated against Mexican-Americans (Pet. App. 128-129), but that the dual school system historically maintained for blacks had not been eliminated (*id.* at 131). It entered an order approving a plan to close two predominantly black secondary schools and to reassign their students to predominantly Anglo schools (*id.* at 120-123).

The court of appeals, sitting en banc, reversed. Six judges joined an opinion detailing a history of discrimination by petitioner (*United States* v. *Texas Education Agency*, 467 F. 2d 848, 852-875 (5th Cir. 1972) (en banc) (hereafter referred to as *Austin I*)). These six judges concluded that petitioner had engaged in invidious discrimination against Mexican-Americans as well as blacks, and that the district court's findings were clearly erroneous. The other eight judges concurred in the result,

concluding that "discriminatory segregation exists against Mexican-American students and that the proposed part-time integration plan of the school district is inadequate as a desegregation plan" (*id.* at 885). The court remanded the case to the district court with directions to identify those schools that were segregated as a result of racial or ethnic discrimination and to eliminate the effects of the segregation by using specified desegregation techniques listed on a priority basis (*id.* at 884-885).

On remand the district court once more concluded that petitioner had not discriminated against Mexican-Americans (Pet. App. 100); it approved a plan to desegregate the sixth grade of the black elementary schools (*id.* at 107).

The court of appeals again reversed and held, for the second time, that petitioner had discriminated against both blacks and Mexican-Americans (Pet. App. 70), and that the partial desegregation plan approved by the district court for black students was constitutionally inadequate (*id.* at 73). The school district's petition for certiorari was granted by this Court and the judgment of the court of appeals was vacated and the case remanded for reconsideration in light of *Washington* v. *Davis*, 426 U.S. 229 (1976) (*id.* at 45-50).[1] The court

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[1] In our response to the certiorari petition in *Austin II*, we observed that it might be "useful" for this Court to remand the case for reconsideration in light of its intervening decision in *Washington* v. *Davis*, and thus, we did not oppose the granting of certiorari. See Brief for the United States, *Texas Education Agency* v. *United States*, No. 76-200, O.T. 1976 at 13. However, we also stated (*ibid.*) that if the Court

> were to undertake plenary review of this case, we would urge that the judgment of the panel be affirmed, in light of the evidence of extensive intentional discrimination against Mexican-Americans.

Because the court of appeals in *Austin III* correctly analyzed that evidence in light of *Washington* v. *Davis*, we believe further review by this Court is unwarranted.

of appeals, applying the criteria of *Washington* v. *Davis* and *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), reaffirmed its earlier conclusion that petitioner had engaged in intentional discrimination against Mexican-Americans (Pet. App. 41), and remanded the case to the district court to reconsider a remedy in light of this Court's decision in *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406 (1977) (*ibid.*).

ARGUMENT

The court of appeals has fully complied with this Court's mandate to reconsider its decision in *Austin II* in light of *Washington* v. *Davis* and its reaffirmance of *Austin II* is correct.

Petitioner contends that in reaffirming its two prior findings of intentional discrimination by petitioner against Mexican-Americans, the court of appeals failed to apply the standards set out in *Washington* v. *Davis* and *Arlington Heights* because the court has "again found unconstitutional segregation of Mexican-Americans solely by the application of a foreseeable consequences standard to disproportionate impact" (Pet. 2). That characterization of the court of appeals' opinion in *Austin III* is unfounded.[2] In fact, the court expressly acknowledged its duty under *Washington* v. *Davis* to ascertain whether the discrimination was purposeful, and in making that inquiry

[2]In view of the court of appeals' explicit rejection of a mechanical application of the foreseeable consequences test in *Austin III* (Pet. App. 8-9), we believe there is no need for this Court to stay action on this petition pending its decisions in *Dayton Board of Education* v. *Brinkman*, No. 78-627, O.T. 1978, and *Columbus Board of Education* v. *Penick*, No. 78-610, O.T. 1978, both of which challenge findings of discriminatory intent allegedly based solely on utilization of a foreseeable consequences test. The petitioners in *Columbus* and *Dayton* have also argued that the remedies in those cases do not comport with the guidelines articulated by this Court in its prior *Dayton* decision. However, the court of appeals has remanded this case to the district court for the specific purpose of affording it the opportunity to formulate a remedy in accordance with *Dayton*.

it looked to the types of evidence identified as relevant in *Arlington Heights* (Pet. App. 20-23).[3]

At the beginning of its opinion in *Austin III* the court of appeals made clear its understanding that disproportionate impact by itself will not support a finding of intentional discrimination (Pet. App. 26):

> *Washington* v. *Davis* and *Arlington Heights* did establish that the disproportionate racial impact of the neutral application of a long-standing neutral policy, by itself, will rarely constitute a constitutional violation. * * * We are well aware that some official actions on which a plaintiff hinges an allegation of unconstitutional discrimination have historically been motivated by racially and ethically neutral *bona fide* concerns, such as the desire to have children attend the school closest to their home, and no showing is made that those concerns were actually subordinate to, or a subterfuge for, unconstitutional discrimination. In those circumstances, that a discriminatory result was the natural and foreseeable consequence of

[3]In addition to mischaracterizing the basis for the court's decision in *Austin III*, petitioner throughout its brief misstates the issue under consideration on remand (Pet. 12-13, 19, 27). That issue was not—as petitioner erroneously claims—whether the school district had rebutted a prima facie showing of intentional discrimination against Mexican-Americans, but rather whether the evidence upon which the court relied in *Austin I* and *Austin II* demonstrated the requisite racially discriminatory intent to constitute a prima facie case. *Washington* v. *Davis* does not turn on rebuttable presumptions; its concern is with the prerequisites for a finding of invidious discrimination. In remanding *Austin II* for reconsideration in light of *Washington* v. *Davis* this Court presumably intended for the court of appeals to reexamine the record for evidence of improper purpose or intent and to make explicit its conclusions on that issue. The court of appeals dutifully carried out that task, and petitioner's incorrect contention that the "real question in the case" (Pet. 13) is whether it has rebutted a prima facie showing should not obscure the substantial evidence of segregative intent identified by the court of appeals.

the actions is insufficient to infuse the challenged acts with the type of discriminatory intent required by *Washington* v. *Davis* and *Arlington Heights*.

While recognizing that disproportionate impact standing alone is not dispositive on the issue of discriminatory intent, the court of appeals heeded this Court's suggestion in *Arlington Heights, supra*, 429 U.S. at 266, that such an impact is "an important starting point" in determining intent (Pet. App. 32). Thus, the court began its factual analysis in *Austin III* by pointing out the substantial degree of racial isolation of Mexican-Americans that persists in the Austin schools where almost 40% of the Mexican-American students attend schools where the minority enrollment exceeds 90% (*id.* at 31-33). The court then turned its attention to the other evidentiary factors held relevant in *Arlington Heights* on the issue of discriminatory intent.[4]

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[4]In discussing the facts (Pet. 19-27), petitioner implies that the court of appeals usurped the fact-finding function of the district court. That suggestion is incorrect. The court of appeals explicitly states in its opinion in *Austin III* and in its opinion denying the petition for rehearing that it is reversing because the district court employed an erroneous legal standard in finding no intentional discrimination against Mexican-Americans (Pet. App. 10, 34-35 n.17). Alternatively, the court holds that even under the "clearly erroneous standard" the district court's finding of no intentional discrimination would warrant reversal (*ibid.*). Thus, the court in *Austin III* exercised what this Court in *Dayton Board of Education* v. *Brinkman, supra*, 433 U.S. at 417-418, has identified as the proper function of an appellate court:

> On appeal, the task of a court of appeals is defined with relative clarity; it is confined by law and precedent, just as are those of the district courts and of this Court. If it concludes that the findings of the district court are clearly erroneous, it may set them aside under Fed. Rule Civ. Proc. 52(a). If it decides that the district court has misapprehended the law, it may accept that court's findings of fact but reverse its judgment because of legal errors.

Looking first to "the historical background" of official actions taken by petitioner with respect to Mexican-Americans, *Arlington Heights, supra*, 429 U.S. at 267, the court of appeals found the evidence—both direct and circumstantial—to demonstrate pervasive purposeful segregation of Mexican-American students in the Austin school system dating back six decades (Pet. App. 34-38).[5] That segregative race consciousness rather than race neutrality motivated petitioner's actions was apparent to the court from such evidence as (1) the construction of Comal Street School specifically for those Mexican-Americans attending the only three schools in the district having more than twenty Mexican-American students; (2) the construction of Zavala School "to provide for the large group of Spanish-speaking citizens of Austin, a suitable well-equipped building as near the center of this population as possible" and (3) the removal of all but one Mexican-American pupil from Winn School in response to a complaint from Anglo parents about "Mexican" pupils at Winn (Pet. App. 9, 35-37).[6]

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[5]Petitioner attempts to minimize the significance of the evidence on which the court relies in *Austin III* by pointing out that it was "set out in the minority opinion in *Austin I*" (Pet. 19, 20), a case which petitioner claims "was decided under an erroneous legal standard" (*id.* at 19).

The importance of the facts cited in *Austin III* is in no way diminished by their having first appeared in an opinion in which only six of the fourteen judges sitting en banc in *Austin I* joined. The other eight judges fully agreed that petitioner was guilty of intentional discrimination against Mexican-Americans and disagreed only as to the appropriate remedy. Moreover, even if petitioner were correct that the court applied an erroneous legal standard in *Austin I*, the error would be in the standard, not in the facts to which it was applied.

[6]The court of appeals also pointed out that the Mexican-American school had attendance zones overlapping those of predominantly

Petitioner maintains that the district court was correct in excusing these acts of segregation as "a humane and compassionate attempt by the School District * * * to meet the special education needs" of Mexican-American children (Pet. 22). The court of appeals properly rejected that contention for the third time in *Austin III* (Pet. App. 34 n.17). Racial animus is not a prerequisite to a finding of invidious discrimination. In the years prior to this Court's decision in *Brown* v. *Board of Education*, 347 U.S. 483 (1954), separate schools, housing, and other facilities for blacks and whites were also thought by some to be in the best interests of both races. But such "humane" considerations are not controlling where equal protection has been denied. See *Buchanan* v. *Warley*, 245 U.S. 60, 80-81 (1917). Moreover, as the court pointed out in *Austin III*, bilingual instruction for Mexican-American students was introduced only comparatively recently in the Austin schools; it certainly could not have justified the establishment of separate schools for Mexican-Americans at a time when teachers were prohibited by state law from conducting classes in Spanish (Pet. App. 34-35 n.17).[7]

In addition to the direct evidence of intentional discrimination reflected in the historical background of

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Anglo schools (Pet. App. 34-35).

Much of this direct evidence of segregative intent is contained in petitioner's own documents and records. Such contemporaneous statements are "highly relevant" in illuminating a decision-making body's intent. *Arlington Heights*, *supra*, 429 U.S. at 268.

[7]Petitioner strains to transform its "humane and compassionate use of then accepted and proper educational techniques" (Pet. 14) into the sort of neutral "purpose the government is constitutionally empowered to pursue" approved in *Washington* v. *Davis* (Pet. 14-15). But this effort to blur the conceptual distinction between "benign motive" and neutral purpose must fail. A neutral purpose is by definition a non-racial purpose. Here the alleged "benign motive" was blatantly racial: its express object was to group Mexican-American children in separate schools on the theory that they would do better in such segregated facilities. Governments are not constitutionally empowered to maintain dual school systems in the belief that it is beneficial to educate the races separately.

the school district's policies toward Mexican-American students, the court of appeals in *Austin III* found considerable circumstantial evidence of segregative intent in other actions by petitioner, including its decisions pertaining to school construction and abandonment, *Swann* v. *Charlotte-Mecklenburg Bd. of Education*, 402 U.S. 1, 21 (1971), and teacher assignment, *Swann*, *supra*, 402 U.S. at 18.[8] For example, when Johnston Senior High School and Martin Junior High School were built, the district selected sites that maximized Mexican-American enrollments and it rejected more central locations that would have produced less isolation (Pet. App. 38).[9] Overcrowding in predominantly Anglo elementary schools was alleviated by building new schools, but overcrowding in the Mexican-American schools was alleviated by the use of portable classrooms (Pet. App. 38 & n.18).

The court of appeals pointed out that the school district has for the most part assigned its few Mexican-American teachers to schools with predominantly Mexican-

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[8]Petitioner asserts that decisions as to construction, abandonment, site selection, and attendance zones are but "elements of the neighborhood school policy" (Pet. 16), but the court of appeals properly recognized that such decisions have in fact been devices for manipulating a facially neutral "neighborhood school" policy to create and maintain segregated schools (Pet. App. 33). In the face of that finding "the mere assertion of * * * a [neighborhood school] policy is not dispositive." *Keyes* v. *School District No. 1*, 413 U.S. 189, 212 (1973).

[9]The rejection of alternatives that would have had a less segregative impact or no such impact is highly probative on the question of intent. See *United States* v. *School District of Omaha*, 521 F. 2d 530, 538 n.13, 540 n.20, 542-543 (8th Cir.), cert. denied, 423 U.S. 946 (1975); *Morales* v. *Shannon*, 516 F. 2d 411, 413 (5th Cir.), cert. denied, 423 U.S. 1034 (1975); *Oliver* v. *Michigan State Board of Education*, 508 F. 2d 178, 182, 184-187 (6th Cir. 1974), cert. denied, 421 U.S. 963 (1975). See generally Note, *Reading the Mind of the School Board: Segregative Intent and the De Facto/De Jure Distinction*, 86 Yale L. J. 317 (1976).

American enrollments, thereby reinforcing the segregated identity of those schools (Pet. App. 39). When desegregation plans were implemented for black students in Austin in 1955 and the 1960's they permitted black students to transfer to Mexican-American schools but not to Anglo schools, and "Mexican-Americans were invariably assigned to black schools but not Anglo schools" (Pet. App. 40).

As this Court recognized in *Arlington Heights, supra,* 429 U.S. at 266, on occasion "a clear pattern, unexplainable on grounds other than race, emerges from the effect of state action" even where the governing policies appear neutral on their face. In the instant case the record contains evidence not only of facially neutral policies carried out in a way that increased the isolation of Mexican-American students, but of non-neutral, explicitly racial policies directed to that end. While it may be that no single decision by the school district compels the conclusion that it engaged in pervasive intentional discrimination against Mexican-Americans, an examination of the whole range of evidence deemed relevant in *Washington* v. *Davis* and *Arlington Heights* leads inexorably to that conclusion. In *Austin III* the court of appeals conducted such an examination and found substantial evidence of invidious intent. Further review by this Court is unwarranted.[10]

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[10]Petitioner also challenges the court of appeals' remand to the district court for reconsideration of an appropriate remedy in light of this Court's decision in *Dayton Board of Education* v. *Brinkman*. In *Dayton, supra,* 433 U.S. at 420, it was held that where constitutional violations are found in a school desegregation case,

> * * * the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution of the * * * school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy.

The district court has not had an opportunity to apply that standard in this case. Indeed, it has not even considered a remedy for the desegregation of the Mexican-American schools. In these circumstances, the court of appeals was entirely correct in sending the case back to the district court for its consideration of the question of appropriate relief. There is no reason for this Court to deal with that issue at this time.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

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and

DEDRA ESTELL OVERTON, et al.,
Intervenor-Respondents.

Opposition to a Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit (Mexican-American Intervenors)

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Intervenor-Respondents.

Opposition to a Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit (Mexican-American Intervenors)

The Mexican American Intervenors respectfully oppose the Petition for a Writ of Certiorari requested by the Austin Independent School District (AISD).

QUESTION PRESENTED

The characterization by the AISD of the issues presented is argumentative and misstated. The sole issue is whether

the AISD engaged in acts of intentional segregation against Mexican American school children.

STATEMENT OF THE CASE

As set forth in Petitioners' statement of the procedural history of the case, there have been two (2) District Court opinions[1], four (4) Circuit Court opinions[2], and one (1) *per curiam* remand by this Court.[3] Various characterizations of these opinions by the Petitioners are, however, incorrect.

First, contrary to assertions by the Petitioners, the entire court of fourteen (14) judges in *Austin I* found the AISD to have been guilty of intentional discrimination against Mexican American students and that the District Court erroneously ruled to the contrary. Six (6) judges speaking through Judge Wisdom outlined the major acts which constituted that finding. 467 F.2d 852, 861-69. The remaining eight (8) judges concurred in this finding, but differed with respect to remedial directions. As those eight judges stated in their special concurrence,

> We concur in the result reached in the opinion prepared by Judge Wisdom to the extent of reversing and remanding the case to the district court with direction that the dual school system and all discriminatory segregation against Mexican and black students be eliminated "at once" . . .
>
> 467 F.2d at 883.

Secondly, although *Austin I* was rendered at a time when there was uncertainty surrounding the *de jure-de facto*

1. Neither District opinion is reported. The first opinion appears at p. 108 of the Appendix; the second opinion appears at p. 94 of the Appendix.

2. 467 F.2d 848 (5th Cir. 1972) (*Austin I*); 532 F.2d 380 (1976) (*Austin II*); 564 F.2d 162 (1977) (*Austin III*); a fourth opinion denying *en banc* reconsideration from *Austin III* is reported at 579 F.2d 910 (1978).

3. 429 U.S. 990 (1976).

distinction, it was the clear finding of all fourteen judges that the AISD had engaged in acts of segregation which were neither innocent nor adventitious. See Judge Wisdom's opinion, 467 F.2d at 861-69; note also the above language in the concurrences which called for the dismantlement of "discriminatory segregation"—not mere "segregation."

After having its opinion in *Austin I* "reversed" by the District Court, purportedly on the basis of this Court's intervening decision in *Keyes v. School District No. 1, Denver, Colorado,* 413 U.S. 189 (1973), a panel, speaking through Judge Wisdom, reversed the District Court a second time. 532 F.2d 380 (*Austin II*). For the second remand the Circuit Court, although alluding to the proof relied upon in *Austin I,* intimated that such proof was unnecessary to its holding. A petition for a writ of certiorari was filed with this Court in response to the *Austin II* holding. The United States, Plaintiff in this case, did not oppose the petition, expressing concern about the intimation that the factual basis undergirding the *Austin* decision was unnecessary. This Court granted the petition and remanded to the Fifth Circuit for reconsideration in light of *Washington v. Davis,* 426 U.S. 229 (1976).

The Petitioner's analysis of the *Austin III* decision, 564 F.2d 162 (1977), which followed remand, grossly misstates the thrust of that decision. Rather than "treat as irrelevant" the District Court's finding of no intent[4], the decision holds for the third time that such finding is clearly wrong. The charge that the Circuit Court was duplicitous in its analysis is belied by the factual findings of the Court *en banc* and by each of the supervising decisions that the segregation of Mexican American children was intentional.

4. Page 9 of Petition.

REASON FOR DENYING THE WRIT

At this juncture of the litigation, the sole issue, with one minor exception[5], is whether the Court of Appeals properly concluded that the AISD had committed acts of intentional segregation of Mexican American children. Issues concerning the scope of relief are not at issue at the present time.[6]

The Petitioners would have this Court believe that there are two issues presented in this case which should be of interest. The first issue is whether the "foreseeability" test is appropriate to measure segregatory intent. The second issue is whether a "benign" motive justifies intentional segregation on the basis of race. As interesting as these issues may be, neither is determinative of the propriety of the Circuit Court's holding. Further, both issues have been addressed, by this Court and by various lower courts; as such, it would serve no useful purpose to further review them.

A. In This Case a Conclusion of Intentional Segregation Is Compelled, Irrespective of the Standard Used to Ascertain Intent.

For approximately the past ten (10) years lower courts have been sifting through factual presentations seeking to ascertain whether non-statutory segregation was intentionally caused. Rarely has direct evidence of intent to segregate been available. In the absence of direct evidence, certain factual patterns have come to be recognized as the segregatory devices utilized by school districts to maintain, albeit imperfectly, separation between Anglo students and others. These devices include, *inter alia,* school placement, optional zones in changing neighborhoods, gerrymandered

5. See discussion *infra* at p. 15.

6. The Fifth Circuit remanded for consideration of the remedy in light of *Dayton Board of Education v. Brinkman*, 433 U.S. 406 (1977); the discussion concerning remand is found at 564 F.2d 174-76.

school boundaries, use of portables and segregated faculty. Each of these commonly recognized devices was utilized in Austin and each succeeded in preserving a degree of segregation which would not have existed without it. Only a Court which chooses to blind itself to the import of these patterns could fail to find that they constituted an effort to maintain ethnic segregation.[7]

Before summarizing the use of these devices in Austin, it is important to recognize that there was direct unrefuted evidence of segregatory acts of a sort rarely found in the desegregation cases. The record reflects, for example, that the Comal Street School was built to "take care of the large number of non-English speaking students at Palm, Metz, and Bickler."[8] Likewise, Zavala School was built "to provide for the large group of Spanish-speaking citizens of Austin a suitable, well-equipped building as near the center of this

7. Such a Court would also be forced to blind itself to the history of discrimination against Mexican Americans in Texas which no doubt served as the foundation for a policy of segregation. On the same day that this Court rendered its decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), it also struck down a policy of exclusion of Mexican Americans from juries in Texas. *Hernandez v. Texas*, 347 U.S. 475 (1954); in so ruling, the Court observed:

> Here the testimony of responsible officials and citizens contained the admission that residents of the community distinguished between "white" and "Mexican." The participation of persons of Mexican descent in business and community groups was shown to be slight. Until very recent times, children of Mexican descent were required to attend a segregated school for the first four grades. At least one restaurant in town prominently displayed a sign announcing, "No Mexicans Served." On the courthouse grounds at the time of the hearing, there were two men's toilets, one unmarked, and the other marked "Colored Men" and "Hombres Aqui" ("Men Here").

347 U.S. 475, 479-80 (FN omitted). See also *Castaneda v. Partida*, 430 U.S. 482 (1977), cf. *Keyes v. School Dist. No. 1*, 413 U.S. 189 (1973).

8. Pre-trial Order, Attachment A, p. K-I.

population as possible."[9] In response to a complaint from Anglo parents at the Winn School, the Superintendent took the following action: ". . . all Mexican pupils enrolled in John B. Winn School, living south of 14th Street, had been transferred to Bickler School, except one boy who is being allowed to complete the 7th Grade."[10] This latter document contradicts assertions in Petitioner's Petition that only limited English speaking students were sent to Bickler.

In addition to these examples of direct evidence of segregatory intent, the Court in *Austin III* found that the School District had maintained dual overlapping zones. It is unrefuted that these zones were only found between predominantly Anglo and predominantly Mexican American schools. 564 F.2d 162, 171-72. The dual overlapping zone is essentially identical to the optional zone frequently found by courts to be a segregatory device. See e.g. *Morgan v. Kerrigan,* 509 F.2d 580, 589 (1st Cir. 1974), *cert. den.,* 421 U.S. 963; *United States v. Board of School Commissioners of Indianapolis,* 474 F.2d 81, 86 (7th Cir. 1973), *cert. den.,* 413 U.S. 920; *United States v. School District of Omaha,* 521 F.2d 530, 540-43 (8th Cir. 1975), *cert. den.,* 423 U.S. 946.

Petitioners do not dispute the Circuit Court's findings that these dual zones (a) were only found between Anglo and Mexican American schools, and (b) contributed to segregation; rather, they offer justification that shows the wisdom of the Circuit Court's conclusion that these zones were discriminatorily motivated. As to the West Avenue (Mexican-American) and Pease (Anglo) zones, the AISD merely asserts (without citation) that when the Mexican American students learned English they went to Pease (p. 23, Petition). This admission reaffirms what was previously an in-

9. Def. Ex. 125, p. 5; Gov. Ex. 6C, August 8, 1935.

10. Gov. Ex. 6F, Sept. 25, 1939.

ference—that students of different races were tracked to respective schools!

The justification for the Zavala (Mexican American)—Metz (Anglo) open zone is a limp protest that Mexican Americans were not required to go to the Mexican school (p. 22, Petition).[11] This, of course, confuses the issue. This device has been seen by the authorities as a means by which Anglo students could escape attendance, otherwise compelled, with Mexican American students.

The *en banc* Court in *Austin I* and the panel in *Austin III* further discussed at some length the gerrymandering of school boundaries and school site selection which contributed to the segregation of Mexican American children. The Court singled out for discussion the situation surrounding the building of O'Henry Junior High School in 1953. The evidence showed that it was built as a predominantly Anglo school and that in order to provide "relief" for Anglo students living in the Allan Junior High School neighborhood, the boundaries were adjusted so that many of these students could attend O'Henry. The predictable result was to further isolate Mexican American students. 564 F.2d at 173. The Court noted a similar occurrence surrounding the dispersal of students at the University Junior High School site after it was reclaimed by the University of Texas. Appendix "C" to the *Austin I* decision provides a further picture of intentional segregation through site selection. This chart describes the ethnic makeup of all schools which opened after 1954. Twenty-four (24) of thirty (30) schools opened with an enrollment in excess of 90% Anglo or minority. 467 F.2d at 882. This unbroken pattern, observed by the Circuit Court, raises a strong inference of intentional

11. No record citation is found in support of this contention. All the record evidence is to the contrary (Transcript 22, 36).

segregation of minority children.[12] Nothing in the record successfully rebuts this inference.

Adding further to the above-stated evidence of intentional segregation, the Court observed that its review of school boundary lines corresponded with ethnically and racially segregated neighborhoods. 467 F.2d at 863, n. 32. This further buttresses the inference of intentional gerrymandering.

Petitioner's response to these findings is to broadly ascribe neighborhood school motivations to this segregatory pattern. Some of the acts viewed in isolation might be susceptible to a neighborhood school argument; however, the pattern of activities which inevitably enhanced segregation, viewed in light of the direct evidence of segregation, necessarily compelled an unrebutted inference of improper motivation. See e.g. *Davis v. School District of Pontiac, Inc.*, 443 F.2d 573, 576 (6th Cir. 1971), *United States v. Board of School Comm'rs of Indianapolis, Ind.*, 474 F.2d 81, 84 (7th Cir. 1973). It was clearly erroneous for the District Court to have ruled to the contrary.

Various courts have found faculty segregation especially probative on the issue of intent since it is so fully within the power of the school district to control.[13] Appendix "A" to

12. This Court has several times noted the segregative power that school boards have through the use of site selection. *Swann v. Charlotte-Mecklenberg Board of Education*, 402 U.S. 1, 21 (1971), *Keyes v. School District No. 1*, 413 U.S. 189, 201-202 (1973).

13. This court observed in *Swann v. Charlotte-Mecklenberg Board of Education*, 402 U.S. 1, 18, that "Independent of student assignments where it is possible to identify a 'white school' or a 'Negro school' simply by reference to the racial composition of teachers and staff—a *prima facie* case of violation of substantive constitutional rights under the Equal Protection Clause is shown." See also *United States v. Board of Comm. of Indianapolis*, 474 F.2d 81, 87 (7th Cir. 1973), *cert. den.*, 423 U.S. 946; *Oliver v. Michigan State Board of Education*, 508 F.2d 178, 185 (6th Cir. 1974); *cert. den.*, 421 U.S. 963 (1975) (Kalamazoo); *United States v. School District of Omaha*, 521 F.2d 530, 537-38 (8th Cir. 1975), *cert. den.*, 423 U.S. 946; *Kelley v. Guinn*, 456 F.2d 99 (9th Cir. 1972).

the *Austin I* decision shows that Mexican American faculty members were generally assigned to predominantly minority schools. While Mexican Americans constituted only three percent (3%) of the total professional staff of the school district,[14] fifteen percent (15%) of the teachers at predominantly minority Johnston High School were Mexican American. Indeed, fifteen (15) of the twenty-three (23) Mexican American high school teachers taught at Johnston, although Johnston only constituted one (1) of eight (8) high schools. At the elementary school level, Mexican American teachers are found at only fourteen (14) of the District's fifty-five (55) schools, and of those fourteen, only four are predominantly Anglo. All of the remaining ten (10) schools at which Mexican American faculty were found had minority enrollments in excess of seventy-five percent (75%) and eight (8) had minority enrollments in excess of ninety percent (90%).

In this brief summary we have obviously not set forth all of the evidence presented to show segregatory intent. What we have tried to show is the existence of well-recognized segregatory patterns which virtually all courts have found to undergird a finding of intentional segregation. These findings have been made irrespective of the formal methodology utilized to ascertain intent. It is thus manifestly unnecessary to evaluate the natural and foreseeable method for ascertaining intent to arrive at a conclusion in the instant case that the segregation existent in the AISD is *de jure*.

14. At the time, Mexican American students constituted twenty percent (20%) of the District enrollment.

B. Logic and This Court's Precedents Support the Use of the Natural and Foreseeable Test for Ascertaining Intent to Segregate.

In its most recent opinion, the Fifth Circuit utilized language that indicated that it was measuring at least some acts to determine if they were part of a pattern which naturally and foreseeably led to segregatory consequences. Through this standard evidentiary approach, the Court was able to conclude that an inference arose that those acts were intentionally motivated. These findings provided a firm foundation in addition to those findings based on direct evidence of segregatory intent (cited, in part, above) for a ruling that the Defendants should have a heavy burden of rebuttal. The AISD challenges the propriety of using this standard tool for raising an inference of intent to segregate. Their challenge violates both logic and a long line of precedent.

The most commonly accepted method for proving intent has been through a presumption drawn from the natural and foreseeable consequences of acts. This is understandable since realistically no other reliable mechanism exists. This is doubly true when intent to segregate is at issue; as recently observed by the Sixth Circuit,

> Indeed, it would be difficult, and nigh impossible, for a district court to find a school board guilty of practicing *de jure* segregation, unless the court is free to draw an inference of segregative intent or purpose from a pattern of official action or inaction which has the natural, probable, and foreseeable result of increasing or perpetuating school desegregation.
>
> *NAACP v. Lansing Board of Education,* 559 F.2d 1042, 1047-48 (6th Cir. 1977) [FN omitted].

As the Circuit Court acknowledged, it has long been the rule in the area of torts that an actor is held to intend the

reasonably foreseeable results of his actions. W. Prosser, *The Law of Torts,* § 8 (4th Ed. 1971); *Restatement 2d of Torts,* § 8A, comment (b) (1965). Likewise, in the area of criminal law a foreseeability standard has long prevailed. Hart, *Punishment and Responsibility,* 120-21 (1968). This Court has ruled that a presumption of intent to interfere with union rights under the National Labor Relations Act arises from conduct which does so interfere, observing that ". . . [T]he employer in such cases must be held to intend the very consequences which foreseeably flow from his actions and if he fails to explain away, to justify, or to characterize his actions as something different than they appear on their face, an unfair labor practice charge is made out." *National Labor Relations Board v. Erie Resistor Corp.,* 373 U.S. 221, 228 (1963). More directly, as the Circuit Court in the instant case observed, the holding in *Monroe v. Pape,* 365 U.S. 167, 187 (1961) adopts the foreseeability standard in litigation, such as this, which is predicated upon 42 U.S.C. § 1983.

While the natural and foreseeable standard is the only logical approach for determining intent, it has not been held either by the Circuit Court in this case or by those authorities above cited as creating an irrebuttable or conclusive presumption. The failure to recognize this fact is the source of the School District's mistake in arguing that the test and the *de jure* standard are inapposite. It might be true, as the AISD argues, that if a court were to conclusively presume that racial imbalance was the product of intentional acts, the court would be measuring a *de jure* requirement against a *de facto* standard. However, if a court were to conclude that racial imbalance in a school system had naturally flowed from the building program of the District, it could and should *infer* intent without adopting a *de facto*

standard. The burden would be shifted to the District to show non-racial reasons for the imbalance. This was the approach utilized in the instant case.

As observed by the Court in *Oliver v. Michigan State Board of Education,* 508 F.2d 178 (6th Cir. 1974) (a school desegregation case adopting the natural and foreseeable test):

> The regimen of presumption of intent established by objective facts and affirmative defense to rebut the inference of improper intent follows the practice in employment discrimination cases. See *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 [citations omitted] (1973); *Long v. Ford Motor Co.,* 496 F.2d 500 (6th Cir. 1974).

Likewise, in *United States v. Board of School Commissioners of Indianapolis, Ind.,* 474 F.2d 81, 88 n. 8 (a school desegregation case adopting the natural and foreseeable standard), the Court noted:

> We note that such inferences are not unique to this area of the law. The doctrine of "conscious parallelism" in anti-trust law involves a similar inference of intent from objective factors. See Anti-Trust Developments, 1955-1958, at 22-24. See also *Littlejohn v. Berbling,* 468 F.2d 389, 408 (7th Cir. 1972).

In a recent article in the Harvard Law Review, Paul Brest offers two policy reasons why a rebuttable presumption triggered by the natural and foreseeable test makes especial sense in the school desegregation context. Brest states:

> This shifting of the burden of proof is justified on two grounds. First, the school district enjoys far better access than the Plaintiffs to the true reasons underlying the myriad of decisions that determine the extent

> of school desegregation—decisions concerning such matters as the drawing of attendance zone lines, the location and size of new schools, and the closing of old ones. Second, despite indications of support for some degree of school integration, it is reasonable to assume that school boards throughout the nation tend to reflect the desires of many white constituents to avoid having their children attend schools with too high a proportion of minority students."
>
> Brest, "The Supreme Court, 1975 Term—Foreword: In Defense of the Anti-Discrimination Principles", 90 HARV. LAW REV. 1, 29-30 (1976).

The panel in the instant case, as well as each of those cases which has expressly adopted the natural and foreseeable standard, has used it as a rebuttable presumption. See e.g. *Morgan v. Kerrigan,* 509 F.2d 580, 588-89 (1st Cir. 1974), *cert. den.,* 421 U.S. 963; *Hart v. Community School Board of Education,* 512 F.2d 37, 50-51 (3rd Cir. 1975); *Oliver v. Michigan State Board of Education,* 508 F.2d 178, (6th Cir. 1974); *cert. den.* 421 U.S. 963 (1975); *United States v. Board of School Commissioners,* 474 F.2d 81, 88 (7th Cir. 1973), *cert. den.,* 413 U.S. 920 (1973); *United States v. School District of Omaha,* 521 F.2d 530, 535-36 (8th Cir. 1975), *cert. den.,* 423 U.S. 946.

Contrary to assertions made by Petitioners, there is no circuit which has requested the 'natural and foreseeable' test. The cases cited (N. 4, Petitioner's brief) from the Ninth Circuit merely reaffirm that intent is a necessary element in establishing liability in a desegregation case. *Soria v. Oxnard School District,* 488 F.2d 579 (9th Cir. 1973), *cert. den.,* 416 U.S. 951 (1974). They do not purport to set a standard or methodology for ascertaining intent. The natural and foreseeable standard was used properly in the instant case.

Contrary to statements by Petitioners, the AISD justifications were obviously weighed by the Circuit Court and found wanting. While it is true that the Circuit Court did not take specific findings and conclusions of the District Court and make declarations of "erroneous" or "not erroneous", such was not possible since specific findings and conclusions were not made by the District Court. A review of that Court's opinion[15] will quickly make clear the impossibility of imposing such a burden on the Circuit Court; rather, as is apparent from the extensive review of the evidence in *Austin I* and the reappraisal of that evidence in *Austin III*, the Circuit Court has performed a monumental task of measuring the District Court's general conclusions against the evidence. Criticism by the AISD of the Circuit Court on that score widely misses the mark.

C. Benign Motives Did Not Motivate the Segregation of Mexican American Pupils in Austin; Even if Some Segregation Could Be Classified as Benignly Motivated, Such Is Not Adequate Justification for the Outcome.

The AISD petition would leave the Court with the impression that all intentional segregation practiced by the District had the end of remediating English language problems. A review of the evidence previously outlined would show that most segregatory acts performed by the District were not narrowly limited to limited English speaking students. The gerrymandering of school boundaries or the placement of schools at points assuring segregated student bodies, for example, are not language specific; rather, they struck at all Mexican American children irrespective of linguistic proficiency.

It further is difficult to believe that benign motives led to the segregation of limited English speaking students

15. Appendix, p. 94.

when in fact state law prohibited teachers from speaking a language understandable to the students and instruction was provided only in English.[16]

Finally, if one were to accept the argument that "benevolence" was one of the motivating factors for some of the acts of segregation, such would be an insufficient legal justification. *Clemons v. Board of Education of Hillsboro Co.*, 228 F.2d 853, 859 (6th Cir. 1956); *Oliver v. Michigan State Board of Education*, 508 F.2d 178, 182-83 (6th Cir. 1974), *cert. den.*, 421 U.S. 963 (1975); see also *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961); *Board of Regents of California v. Bakke*, ... U.S. ....., 57 L.Ed. 2d 750 (1978). One suspects that every act of segregation or discrimination has, as in the instant case, been met by a claim by the perpetrator of benign motivation. This Court, as reflected in the above-cited authorities, has regularly and summarily rejected this claim.

D. The Circuit Court of Appeals Was Clearly Correct in Reversing an Order Which Kept Black Children Segregated in Grades Kindergarten Through Five.

By its remand, the Fifth Circuit ordered the District Court to conduct a *Dayton* hearing; it also reiterated its ruling that the previous order by the District Court with respect to the integration of black children was inappropriate.

16. Related to this claim is the argument by the AISD that patterns of teacher segregation, which are manifested in the chart at 467 F.2d at 876-79, are merely reflective of their efforts to provide bilingual programming. That chart shows student and staff distribution in 1970-71. The first state-mandated bilingual program called for programming at Grade 1 for the school year 1974-75. (SB 121; presently § 21.451-21.460 Tex. Ed. Code). No evidence in the record reflects a substantial initiative independent of the state-mandated program.

The Plan adopted by the District Court for these children starkly reflects the barriers that the Circuit Court has had to overcome in the instant case. That Plan exempted Grades Kindergarten through 6. It also relied exclusively on the one-way busing of the black children. The Circuit Court was clearly correct in finding this plan constitutionally inadequate.

The thrust of the Petitioner's argument on this issue is that the School District provided the District Court factual support for finding that the continued segregation of black children in six grades met the conditions set forth in *Swann v. Charlotte-Mecklenberg Board of Education,* 402 U.S. 1 (1971). A thorough review of the record belies this contention. Rather than present any significant evidence that geographic or other conditions unique to Austin precluded desegregation of these children, the school district relied on general testimony by Dr. Davidson, the Superintendent, that he did not consider busing of such children to be educationally advantageous. Indeed, a blanket exclusion of six grades could not be expected to rest on anything more than a general opposition to a busing approach.

While it is clear that the practicalities of desegregation must be taken into consideration, and in some situations one race schools may be permissible, the School District is under a heavy burden to justify such continued segregation. *Swann, supra,* 402 U.S. 1, 26. Given an uncontroverted history of statutorily imposed segregation of black children, the blanket exclusion of six grades from desegregation on the naked assertions of disagreement with the educational merit of busing cannot meet this burden. The Circuit Court clearly was correct in finding the District Court's adoption of the AISD plan improper.

The Petitioners also intimate that the inclusion of Grades Kindergarten through Five in a desegregation plan violates congressional policy. 20 U.S.C. 1702(a)(5) cited for this proposition, states that "Congress finds that the risks and harms created by *excessive* transportation are particularly great for children enrolled in the first six grades." [Emphasis added]. In 20 U.S.C. 1702(a)(4), Congress defines "excessive transportation" in language similar to this Court's *Swann* limitation. "Excessive transportation" is defined as that which "creates serious risks to their [students'] health and safety, disrupts the educational process carried out with respect to such students, *and* impinges significantly on their educational opportunity." [Emphasis added]. The record in no way supports a conflict with this congressional policy.

CONCLUSION

For the above-stated reasons, Respondent Mexican American Intervenors respectfully request this Court to deny the Petition for Certiorari.

Respectfully submitted,

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